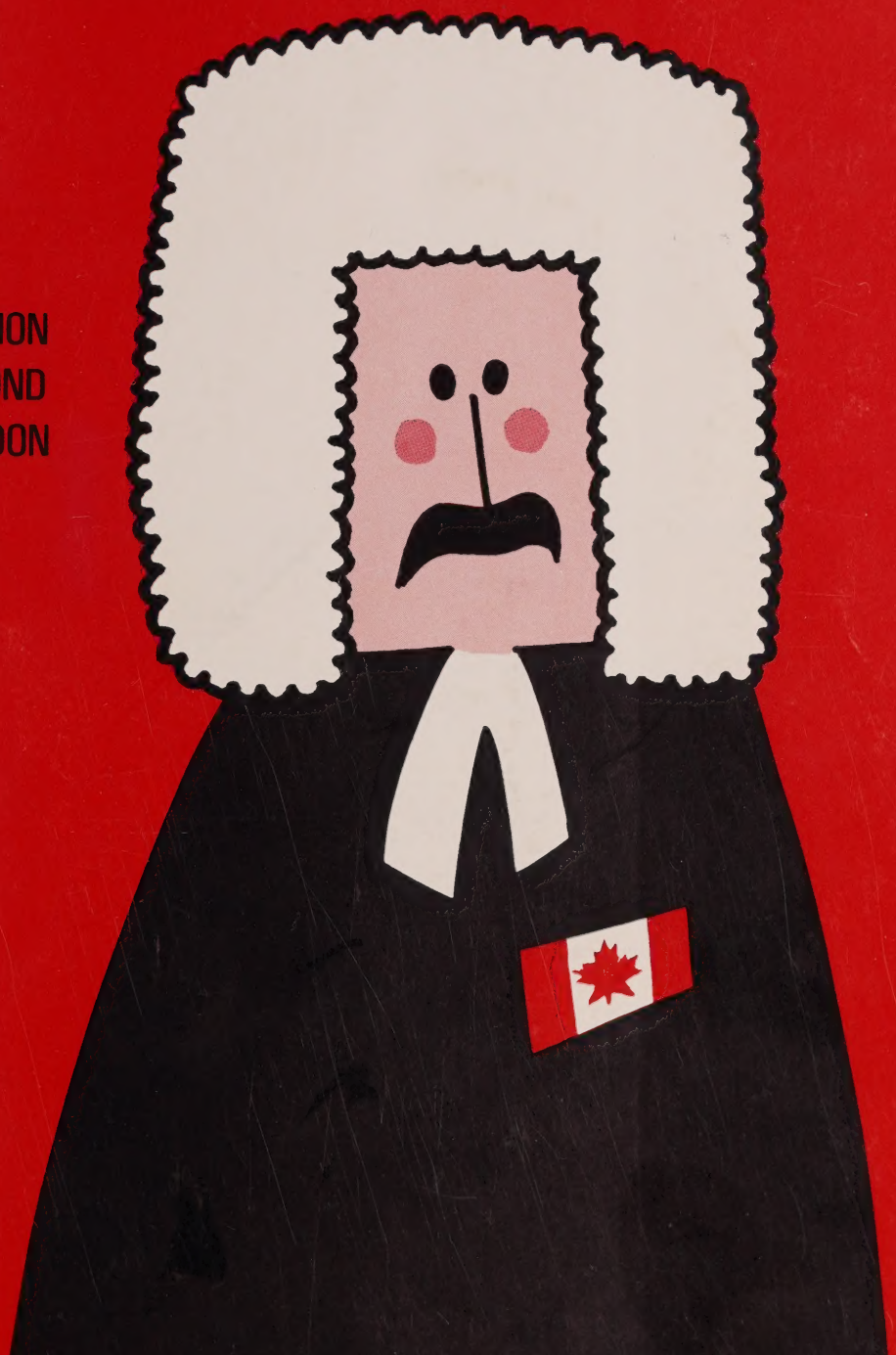
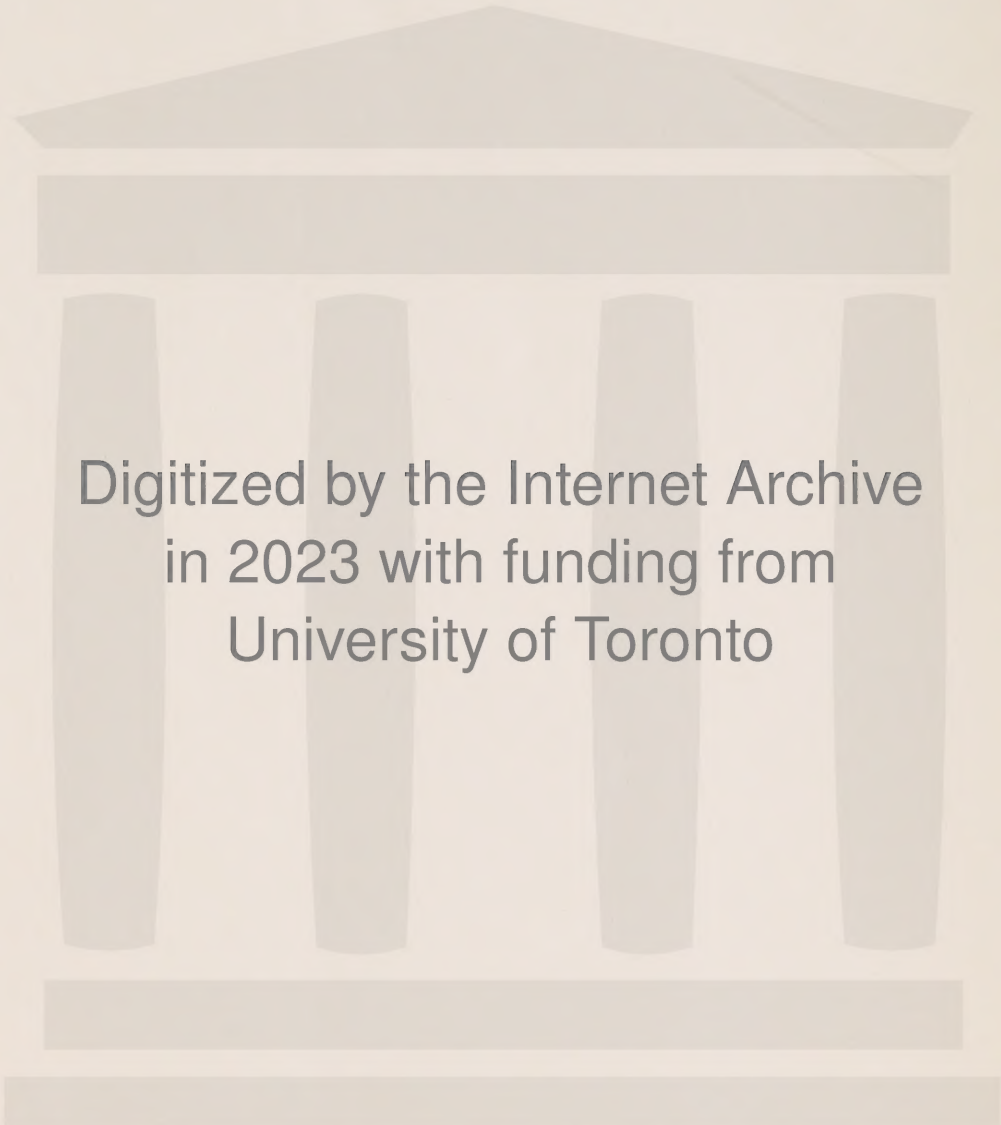
Drug and Alcohol Law for Canadians

(SECOND EDITION)



ROBERT SOLOMON
TRACY HAMMOND
SHARYN LANGDON

ADDICTION
RESEARCH
FOUNDATION
Toronto



DRUG AND ALCOHOL LAW FOR CANADIANS

Second Edition

by

Robert Solomon, LL.B., LL.M., Professor of Law,
University of Western Ontario

Tracy Hammond, LL.B. Candidate, Faculty of Law,
University of Western Ontario

Sharyn Langdon, B.A., LL.B.

Addiction Research Foundation
Toronto

The views expressed in this publication are those of the authors and do not necessarily represent those of the Addiction Research Foundation.

Canadian Cataloguing in Publication Data

Solomon, Robert M., 1946-
Drug and alcohol law for Canadians

ISBN 0-88868-113-5.

1. Narcotic laws - Canada. 2. Pharmacy - Law and legislation - Canada. 3. Liquor laws - Canada.
I. Hammond, Tracy, 1962- II. Langdon, Sharyn, 1960- III. Addiction Research Foundation of Ontario.
IV. Title.
(Addiction Research Foundation of Ontario)

KE3714.S64 1985a 344.71'054 C85-0998358-4

CONTENTS

TABLES

PREFACE

The purpose of this handbook is to provide a discussion of Canadian alcohol and drug laws for those with no legal training. Our primary goal is to explain the existing laws, the criminal procedures used to enforce them, and the consequences of arrest and conviction. We have attempted to provide a clear statement of the general principles in language that can be readily understood by members of the public.

We are indebted to a large number of people in the legal community who have given us the benefit of their comments and criticisms. More specifically, we would like to thank Mr. M. Dambrot, Senior Counsel, Federal Department of the Attorney General; Mr. M. Green, Ruby & Edwardh; Mr. M. Segal, Senior Counsel, Ontario Ministry of the Attorney General; Chief Superintendent R. Stamler, RCMP; Inspector J. Robinson, London City Police Department; The Honourable G.P. Killeen, Senior District Court Judge, County of Middlesex; Mr. R. Nowell, of Nowell Insurance; and Professors P. Barton, A. Bryant, B. Hovius, and S. Usprich, Faculty of Law, the University of Western Ontario. We would also like to thank Ms. R. Cairns Way, Ms. M. Gleason, Ms. B. Boake, and Mr. W. Van de Kleut, students at the Faculty of Law, the University of Western Ontario, who have worked on the handbook. There are several people at the Addiction Research Foundation who have made a valuable contribution to the handbook, including Ms. J. Blackwell, Mr. T. Cox, Dr. P. Loranger, Dr. K. Fehr, Dr. E. Single, and Mr. R. Simpson. We are also grateful for the support and abundant patience of Mr. H. Schankula, for the editorial skills of Ms. C. Cragg and Ms. A. MacLennan, and to Mr. D. Murray for design expertise, and Ms. L. Hatashita for coordinating production. We would like to thank the Addiction Research Foundation of Ontario and the Faculty of Law of the University of Western Ontario, both of which provided research funds to support the preparation of the manuscript. A special thanks is owed to the Law Foundation of Ontario and its staff for their generous financial support over two years. Without their contribution of summer research funds, it would not have been possible to complete the original draft and many revisions within our project deadlines.

January 3, 1986

CHAPTER 1: INTRODUCTION

The Purpose of this Handbook

This handbook was written to provide you with some basic information about the drug and alcohol laws of Canada, the related Ontario legislation, and the legal consequences of their violation. We have attempted to avoid using complex legal terminology so that you may better understand the information. Nevertheless, these laws are not straightforward, and parts of the handbook will be challenging.

This second edition, revised only a year after the first edition appeared, incorporates changes in the law within that period. We have also mentioned some of the more important new measures that the government has proposed. At least some of them may be included in our law in the near future. The many recent changes in Canada's alcohol and drug laws add another measure of uncertainty. For example, the Criminal Law Amendment Act, which made sweeping changes in the federal laws governing illicit drugs and drinking and driving, only came into force on December 4, 1985. It may be several years before we know how the courts will interpret this new legislation and how the police will enforce it.

Drug and alcohol policies often generate strong and conflicting opinions. The purpose of this handbook is not to advocate any particular view or even to address all the controversies. Rather, it is to provide you with an accurate picture of Canadian law. By increasing your understanding, the handbook will help you to make your own informed judgments.

In most of the chapters we have included questions and discussion materials. These are intended to serve two purposes. First, we want to emphasize some key issues, and second, we wish to give you an opportunity to develop your own ideas and opinions. Our goal is to promote thoughtful discussion, rather than to test your knowledge.

The handbook is not intended as a self-help manual for those in trouble with the law. Our general discussions do not raise the specific legal questions that must be resolved in individual cases. Those with legal problems should seek professional legal assistance.

Although many laws affect young people, we think that the drug and alcohol laws are of particular concern. Patterns of drug use--whether they involve cigarettes, alcohol, marijuana, LSD, or heroin--are usually established when people are in their teens. The decisions that they make now about drug and alcohol use have important health, safety, and legal consequences. For example, thousands of teenagers are killed or injured each year as the result of driving while impaired by alcohol or drugs. Each year, thousands of young people are arrested for possession of marijuana, hashish, or hashish oil and for other federal drug offences. Since the mid-1960s, well over 500,000 charges have been laid for the cannabis offences, and the majority of those charged are young. Teenagers and those in their early twenties also figure prominently in federal drinking and driving charges, which numbered over 167,000 in 1982. Although first offenders are rarely sentenced to jail for these crimes, all federal offenders have a criminal record.

In summary, we believe that young people have to make very important personal decisions about alcohol and drug use, and we hope that this handbook will assist them in making informed and responsible choices.

Defining and Classifying Drugs

What Is a Drug?

There is no single answer to this question. People use the term "drug" in a variety of ways. It is often used to refer only to those substances that are illegal to possess or sell, such as heroin, cannabis, and LSD. Other people use the word "drug" as a

synonym for medicine--that is, any substance used in the prevention or treatment of illness. Many people do not consider alcohol, tea, coffee, or cigarettes to be drugs, although most scientists do.

Given the range of possible definitions, we must indicate what we mean by the term "drug." We have adopted the definition that was used by the Canadian Royal Commission of Inquiry into the Non-Medical Use of Drugs. The Commission defined a drug as "any substance that by its chemical nature alters structure or function in the living organism."

This definition includes the illegal drugs referred to above, as well as medicines, alcohol, coffee, tea, and tobacco. We will be concentrating on a relatively small number of drugs; namely, alcohol and the drugs governed by the Narcotic Control Act (NCA) and the Food And Drugs Act (FDA).

Questions and Discussion Materials

1. Why do many people not consider alcohol, caffeine, and tobacco to be drugs?

2. Can you think of any reason to treat these substances as drugs?

3. Given that there are many definitions of the term "drug," what problems could arise in making laws in this field?

4. What substances do you consider to be drugs? Why?

The Medical Classification of Drugs

There is some public confusion about the medical and legal classification of drugs. The medical classification of a drug is based on its usual effects. Listed below are

some of the major medical categories of drugs that the laws are concerned with because of their mood- or mind-altering effects.

Stimulants

Stimulants generally increase brain activity, causing increased blood pressure and heart rate, heightened alertness, and postponement of the need for sleep. Examples of stimulants include amphetamines ("pep pills") and cocaine. Caffeine and tobacco also have mild stimulant effects.

Sedatives and Hypnotics

The major characteristic of sedative/hypnotic drugs is a slowing of brain activity. Such drugs have a general calming effect. Some of these drugs are used medically to reduce tension and anxiety, and to induce sleep. Included in this classification are barbiturates, tranquillizers, antihistamines, and alcohol.

Psychedelics and Hallucinogens

Although these drugs may produce stimulant and depressant reactions, their dominant characteristic is that they alter a user's perceptions, moods, and sensations. Among the more common drugs in this category are cannabis (marijuana and hashish), LSD, psilocybin, mescaline, MDA, and phencyclidine (PCP).

Opiates

The opiates include the drugs derived from the opium poppy plant, such as opium, codeine, morphine, and heroin, as well as similarly acting synthetic chemicals, such as methadone and meperidine (trade name, Demerol). The opiates are powerful depressants. Several opiates are used medically to relieve pain, and some are used to suppress coughs.

The Legal Classification of Drugs

The legal classification of a drug is not based on its effects. Rather, drugs are grouped according to the legal restrictions that are imposed upon them. For example, the word "narcotic" (sleep-inducing, numbing) medically applies to the opiates and the opiate-

like drugs. However, non-opiates such as cannabis, cocaine, phencyclidine (PCP), and other drugs are defined as narcotics for legal purposes, simply because they come under the Narcotic Control Act.

Questions and Discussion Materials

1. Do you think that the medical and legal classifications of drugs should be the same?

2. Should two drugs with similar effects be subject to the same law? Would it make a difference if one drug is widely used in medicine and the other drug has no medical use?

3. Why do you think cannabis is considered a narcotic for legal purposes?

4. If research reveals that a drug is more harmful than previously thought, should greater legal restrictions be imposed? What other factors should be considered in determining the legal classification of a drug?

The Legal System

Legal Responsibility

Laws are the formal rules by which a society is organized. The basic purpose of our legal system is to assist people to live in harmony. The vast majority of laws deal with common everyday concerns that are not controversial. For example, almost everyone would agree that there must be a law requiring drivers to stop at red lights. This law benefits all users of the roads.

Our alcohol and drug laws tend to be controversial. Many people feel that the drinking and driving laws are too lenient, and others have argued that some drug laws are too harsh. What is important to emphasize at this point is that regardless of how you feel

about a law, you are required to obey it. The fact that you honestly believe that a law is unreasonable, unfair, or even immoral provides no legal excuse for violating it.

Another basic principle of our legal system is that everyone is expected to know and obey the law. Consider the example of people who mistakenly believe that it is lawful to possess a small quantity of marijuana for their own use. These people are guilty of the criminal offence of possession of a narcotic, despite their mistaken belief. The phrase "ignorance of the law is no excuse" is often used to express this basic concept.

Questions and Discussion Materials

1. How do you find out about the law? Do you think that it is fair to expect everyone to know the law?

2. What problems might arise if ignorance of the law was accepted as a legal excuse?

3. Should the government be required to publicize new laws on TV and radio, and in newspapers?

4. Is it possible to make drug and alcohol laws that are not controversial? How should society resolve conflicting opinions about these laws? For example, whose views should the government take into account in making tobacco laws? Should the opinions of tobacco farmers and health experts be given equal weight?

5. Some people argue that the criminal law should only apply to conduct that poses a threat or danger to another person. What do you think of this view?

The Division between Federal and Provincial Laws

The Canadian Constitution divides the power to make laws between the federal and provincial governments. Generally speaking, the federal government has authority to enact laws about things that affect the country as a whole, such as customs

and excise, immigration, national defence, international trade, and criminal law. The provinces have the power to pass laws about matters of a local or provincial concern, such as highways, health care, trade within the province, and the licensing of shops, stores, and other retail outlets.

Several important consequences flow from this constitutional division of powers. First, it determines which level of government can pass laws regulating your conduct. For example, the federal government has made it a crime to drive while your ability to do so is impaired by alcohol or another drug. This legislation applies across Canada. However, it is the provinces that have the constitutional power to enact legislation directly governing drivers' licences, and this legislation varies from province to province. Consequently, you will be prosecuted under federal criminal law for impaired driving, but it is provincial law that determines whether your criminal conviction will result in the loss of your driver's licence.

The Constitution also imposes limits on the powers of the federal and provincial governments. The Canadian Charter of Rights and Freedoms sets out a number of guaranteed rights for all Canadians. The Charter is part of the "supreme law" of the country. Consequently, the federal and provincial governments do not have the constitutional power to pass laws that interfere with these guaranteed rights, except in unusual circumstances. The Charter and its impact on alcohol and drug laws will be discussed in Chapter 10.

Another extremely important consequence of the Constitution is the distinction between a federal "crime" and a provincial "offence." Only the federal government has the constitutional power to enact laws that define something as a crime. Basically, any violation of the federal legislation discussed in this handbook is a crime, for which the offender receives what is known as a "criminal record." As we shall discuss in Chapter 9, there are several potentially serious problems that may result from having a criminal record.

The provinces may create offences in areas where power has been given to them in the Constitution. Since the provinces have constitutional authority to pass laws concerning highways, the provincial highway traffic acts establish numerous offences. You can be fined and imprisoned for violating these provincial laws, and detailed records

are kept of all convictions. However, those convicted of violating a provincial law do not have what is known as a "criminal record."

Questions and Discussion Materials

1. Should drug and alcohol laws be governed by the federal or provincial government, or both?

2. What are the advantages and disadvantages of having the same laws apply throughout Canada?

3. What does it mean when we say the Charter of Rights and Freedoms is the "supreme law" of Canada?

4. What is meant by the term "criminal record"? Can you get a criminal record for violating provincial law?

CHAPTER 2: THE FEDERAL DRUG LAWS

There are two major federal statutes in Canada dealing specifically with illegal drugs--the Narcotic Control Act (NCA) and the Food And Drugs Act (FDA). Although these are the most important federal drug Acts, other federal statutes create crimes involving drugs. For example, the Criminal Code makes it a crime to drive while your ability to do so is impaired by alcohol or another drug.

The NCA and the FDA each set out offences and penalties, and both contain some special police powers. However, the Acts do not refer to police powers of arrest, appeals, or many other rules of procedure that govern the investigation, apprehension, and trial of a suspect. These matters are governed by the Criminal Code, which contains the major body of criminal law and procedure. There is a federal law that, in effect, applies the Criminal Code's procedural provisions to offences created by other federal statutes. Consequently, many of the Criminal Code's procedural provisions apply to offences created by the NCA and the FDA.

Before we look specifically at the federal drug Acts, it is necessary to understand the classification of federal offences. All federal offences may be divided into one of three categories--summary conviction offences, indictable offences, and dual procedure offences. The prosecutor is given discretion in dual procedure offences (also referred to as "hybrid" or "crown electable" offences) to proceed either by summary conviction or by indictment. Generally, it is the seriousness of the particular case that determines whether the prosecutor will elect to proceed by indictment or summary conviction. Once this decision is made, the case is treated like any other summary conviction or indictable offence.

The essential difference between indictable and summary conviction offences is the nature of the criminal procedures that govern them. The Criminal Code contains basically one set of procedures for summary conviction offences and another set for indictable offences. As a general rule, the more serious crimes are indictable, and this is reflected in the nature of the procedures. For example, police are given broader powers of arrest for indictable offences than for summary conviction offences. The trial procedures used for indictable offences are more formal and complex than those that govern summary conviction offences. A person charged with an indictable offence generally has a right to a jury trial, whereas those charged with summary conviction offences do not.

The prosecutor's exercise of discretion in dual procedure offences may affect not only the procedures but also the sentence. Dual procedure offences generally provide two maximum sentences--one if the case is tried by summary conviction, and a second, usually heavier, maximum sentence if the case is tried by indictment. For example, cannabis possession is a dual procedure offence. If tried by summary conviction, possession carries a maximum sentence of six months' imprisonment and a $1,000 fine for a first offence. However, if tried by indictment, possession carries a maximum sentence of seven years' imprisonment.

Questions and Discussion Materials

1. How does the Criminal Code supplement the NCA and FDA?

2. Explain in your own words the differences between summary conviction and indictable offences.

3. Is it fair that two people who commit the same crime may be tried by different procedures and face different maximum sentences?

4. What factors should prosecutors take into account in deciding how to exercise their discretion in dual procedure offences?

The History of the Federal Drug Laws

Prior to 1908, few restrictions were imposed on the sale or use of drugs, whether they were intended for medical or non-medical purposes. Canada annually imported tons of raw opiates. Drugs of all kinds were widely distributed by doctors, travelling medicine shows, patent medicine companies, pharmacies, general stores, and Chinese opium shops. Drug dependence was not viewed as a criminal matter, but rather as a personal weakness or vice.

Origins of the Narcotic Control Act

The first federal criminal law arose out of concern about opium smoking among the Chinese. During the 1860s and 1870s, Chinese workers were welcomed to the Canadian west coast because they provided a cheap, reliable source of labor for the developing railroads and mines. The fact that the Chinese workers preferred opium to alcohol was of no concern. Attitudes towards the Chinese and opium smoking changed quickly in the 1880s when an economic decline greatly reduced job opportunities. The Chinese were accused of taking jobs away from white workers, and there were strong and bitter demands to end Chinese immigration. The federal government responded by establishing two royal commissions and by imposing a special tax on Oriental immigrants.

Racial tensions continued to mount, and in 1907 white workers rioted and attacked Oriental businesses in downtown Vancouver. William Lyon MacKenzie King, the federal official appointed to investigate the riot (and later Canada's longest-serving prime minister), was shocked to discover the existence of a well-established and legal Chinese opium trade. He filed one report on the riot and another report condemning opium smoking. Shortly after his opium report was received, Parliament passed the 1908 Opium Act, making it a crime to import, manufacture, offer to sell, sell, or possess to sell opium for non-medical purposes.

Difficulties in enforcing the Opium Act and alarm about other drugs led to the enactment of a more comprehensive statute in 1911. Cocaine, morphine, and other drugs were added to the list of prohibited substances, special police powers were enacted, and possession and other offences were created.

Another series of changes was made during the 1920s. Police powers were greatly expanded and severe penalties were enacted including, for some offences, hard labor, whipping, and mandatory deportation of convicted aliens. The rights of drug suspects were limited, new offences were created, and marijuana and other drugs were added to the schedule of prohibited substances.

Although further changes were made between 1930 and 1960, the current NCA resembles the 1929 legislation. The Act still governs opiates as well as other drugs that are legally (although not medically) defined as narcotics, and still contains severe penalties and broad enforcement powers.

Origins of the Food And Drugs Act

Although the predecessors to the FDA can be traced back to the last century, the sections dealing with non-medical drug use are relatively new. Until the 1960s, the FDA was primarily concerned with ensuring that foods, cosmetics, medicines, and medical devices were produced in sanitary conditions, were safe for human consumption and use, and were honestly advertised. The federal government added new parts to the FDA in the 1960s to deal with the increased non-medical use of LSD, amphetamines, barbiturates, and other drugs.

The Present Narcotic Control Act

There are now approximately 100 different substances listed in the Schedule to the NCA. Each is a narcotic for legal purposes, and each is subject to the provisions of the Act. The federal government can add to or delete any substance from the Schedule by Order in Council.

Except for the offence of cultivation, which applies only to opium and cannabis, the Act does not distinguish among the drugs in its Schedule. For example, cannabis and heroin offenders are subject to identical police enforcement powers, processes of fingerprinting and photographing, penalty provisions, and criminal record

consequences. A relatively small number of drugs--cannabis, cocaine, phencyclidine (PCP), and heroin--account for virtually all the charges under this Act.

The Act contains six common offences: possession of a narcotic (often referred to as "simple possession"); trafficking in a narcotic; possession of a narcotic for the purpose of trafficking; importing or exporting a narcotic; cultivation of opium or cannabis; and an offence commonly referred to as "prescription shopping" or "double doctoring."

Possession of a Narcotic

The Narcotic Control Act adopts the broad definition of "possession" found in the Criminal Code. Basically, in order to be convicted of possession you must know what the substance is and have some measure of control over it. Possession charges can be laid in three different kinds of situations.

The simplest cases are those in which the police find a narcotic in an accused's physical possession. This situation would arise if the police caught you smoking a joint or if they found it in your wallet while searching you.

Second, you may be convicted of possession of a narcotic even if you are not in "physical possession." That is, you may be convicted of possession for controlling a narcotic that is in another place or within another person's physical possession. Assume that you hide some marijuana in a box of books that you store in a friend's apartment. Assume, as well, that you tell your friend about the marijuana but not her room-mate. If the police find the marijuana, you can be convicted of possession because you had some control of the drug, even though it was not in your physical possession. Your friend could be convicted because she knowingly possessed the marijuana. The room-mate could not be convicted, because she did not know the box contained an illegal drug.

The third type of situation is the most complex. Drugs found in the possession of one member of a group may be considered, for legal purposes, to be in the possession of the other members if they were aware of the possession, consented to it, and had some control over the situation. You would not likely be found to be in possession simply

because you were at a party where some other people were smoking marijuana, or because you walked down the street with someone who you knew had a joint in his or her pocket. In these situations, you may have knowledge of the illegal possession, but that does not mean you consented to it or had the power to control the situation. The result might well be different if you permitted a friend to smoke a joint while you were both sitting in your car. As the owner of the car, you have a legal right to control what happens in it. Your failure to stop your friend would provide a clear indication that you consented to his or her illegal possession.

Possession of any amount of a narcotic is unlawful, and you can be convicted of possession even if the police seize only traces of the drug. Consequently, ashes from a joint or the scrapings from a hash pipe will support a possession conviction. If the police seize a quantity of drugs that would not normally be used by only one person, you can be charged with the more serious offence of possession of a narcotic for the purpose of trafficking.

Possession of a narcotic is a dual procedure offence. If you are tried by summary conviction, you may be imprisoned for up to six months and fined up to $1,000 for a first offence, and imprisoned for up to one year and fined up to $2,000 for any subsequent conviction. If, however, the prosecutor proceeds by indictment, the maximum penalty is seven years' imprisonment.

Questions and Discussion Materials

1. Provide your own example of a case where someone would be in "physical possession" of marijuana but not know this. Can you think of a situation in which someone would have control over marijuana but not have "physical possession"?

2. Should the law be changed to make it an offence to remain in a place where others are obviously using illegal drugs?

3. The law gives judges a great deal of discretion in sentencing those found guilty of possession. What factors should a judge consider in sentencing these offenders?

Trafficking in a Narcotic

The NCA broadly defines the offence of trafficking to include manufacturing, selling, giving, administering, transporting, sending, delivering, or distributing a narcotic. You can also be charged with trafficking for offering or agreeing to do any of these things, even if you have no intention or ability to fulfill your promise. No exchange of money is necessary, and you can be convicted of trafficking for giving away or even offering to give away any quantity of a narcotic. No distinction is drawn between a member of organized crime who sells kilograms of heroin and someone who shares a single joint with a friend--both are trafficking. However, the drug involved, the quantity, and the offender's motive are factors that are usually considered in sentencing.

You may also be charged with trafficking for selling a substance that is not a narcotic if you claimed it to be a narcotic. For example, you can be convicted of heroin trafficking for selling sugar alleging it to be heroin.

Trafficking is an indictable offence that carries a maximum sentence of life imprisonment.

Possession of a Narcotic for the Purpose of Trafficking

The police will usually charge a suspect with simple possession if they seize a small quantity of drugs that they believe is for the suspect's own use. However, if the amount of drugs seized would not normally be used by only one person, then the suspect may be charged with possession for the purpose of trafficking.

The police will also take into account other evidence of trafficking, such as scales, bags, lists of names, a large quantity of small bills, a large quantity of cash, or the accused's own statements. These may support a conviction of possession for the purpose of trafficking even if only very small amounts of a narcotic are involved. The police do not have to prove that the drugs were intended for sale. For example, you may be convicted of possession for the purpose of trafficking if you admit to the police that you were going to share the joints that they seized from you.

Possession for the purpose of trafficking is an indictable offence that carries a maximum sentence of life imprisonment.

Cultivation of Cannabis or Opium

Unless you are authorized by the government, it is a criminal offence to cultivate any quantity of cannabis or opium. Whether you grow huge fields of cannabis or keep a single plant, you can be convicted of cultivation. The prosecutor must establish that you knew what the plant was and did something to assist its growth. Cannabis grows wild in some parts of Canada, and someone who is unaware of its presence on his or her land could not be convicted. A person found in possession of cannabis seeds could be charged with possession, or possession for the purpose of trafficking, but not cultivation.

Cultivation of cannabis or opium is an indictable offence that carries a maximum sentence of seven years' imprisonment.

Importing or Exporting a Narcotic

Importing and exporting are among the most serious crimes in Canadian criminal law. You may be charged with importing or exporting if you transport any quantity of a narcotic across the Canadian border or arrange to do so. The fact that you intended to use the drug yourself or that the quantity is extremely small is no defence to an importing or exporting charge.

Importing and exporting are indictable offences and carry a mandatory minimum sentence of seven years' imprisonment and a maximum of life. Except for murder and high treason, no other crime carries as great a mandatory minimum penalty.

Questions and Discussion Materials

1. Do you think that sharing or giving away a narcotic should constitute trafficking? If not, how would you redefine the offence?

2. The federal government had proposed legislation to expand the definition of trafficking to include the act of prescribing a narcotic for non-medical purposes. Examples would include a doctor prescribing opiates to an addict out of sympathy, or prescribing amphetamines to a student cramming for an examination. Had this proposal been made into law, the doctor could have been charged with trafficking. Would you favor the enactment of such legislation?

3. Are the maximum penalties for trafficking too heavy? What about cases involving major heroin distributors?

4. Would you favor a mandatory minimum penalty for trafficking and possession for the purpose of trafficking?

5. Would you favor removal of the mandatory minimum penalty for importing and exporting?

6. Should the law distinguish between those who grow small quantities of drugs for their own use and those who grow a large quantity for the purpose of selling it at a profit?

7. Do you think that the existing penalties discourage people from breaking these laws?

Prescription Shopping or Double Doctoring

Although narcotics used for medical purposes can be obtained by prescription, access to them is carefully controlled. The NCA makes it an offence to get or attempt to get narcotics from one doctor, without disclosing that you have obtained a prescription for narcotics from another doctor within the previous 30 days. Until the Criminal Law Amendment Act came into force on December 4, 1985, prescription shopping was classified in the Regulations as a summary conviction offence that carried a maximum penalty of a $500 fine and six months' imprisonment. Prescription shopping was moved from the Regulations to the NCA itself and was made a hybrid offence. If tried by summary conviction, it carries a maximum penalty of six months' imprisonment or a $1,000 fine for a first offence, and one year's imprisonment or a $2,000 fine for a

subsequent offence. If tried by indictment, the maximum penalty is seven years' imprisonment.

The Narcotic Control Act: Offences, Definitions, and Penalties

Offence	Definitions	Maximum penalty*
Possession	— to knowingly have a narcotic on your person — to knowingly control a narcotic in another place or within another person's possession — knowledge, consent, and some control over a narcotic in the possession of a fellow group member	**Summary Conviction** — First offence: 6 months & $1,000 fine — Subsequent offence: 1 year & $2,000 fine **Indictment** — 7 years
Trafficking	— to manufacture, sell, give, administer, transport, send, deliver, or distribute any narcotic or substance held out to be a narcotic — to offer to do any of these things	**Indictment** — life
Possession for the purpose of trafficking	— to possess any narcotic for the above-mentioned purposes	**Indictment** — life
Cultivation	— to knowingly grow or assist the growth of opium or cannabis	**Indictment** — 7 years
Importing or exporting	— to knowingly transport or arrange for the transport of any narcotic across the Canadian border	**Indictment** — life (7 years mandatory minimum)
Prescription shopping	— to obtain or attempt to obtain a narcotic from one doctor, without disclosing a prescription for a narcotic obtained from another doctor within the previous 30 days	**Summary conviction** — First offence: 6 months or $1,000 fine — Subsequent offence: 1 year or $2,000 fine **Indictment** — 7 years

* As in many other areas of criminal law, the maximum penalties are rarely imposed under the NCA except in the most serious cases.

The Present Food And Drugs Act

As indicated earlier, the FDA is primarily concerned with ensuring that foods, cosmetics, medicines, and medical devices are safe for human consumption or use. We will only be discussing a very small section of this complex Act; namely, the two parts dealing with drugs that might be used for non-medical purposes, and the Regulations governing the unauthorized sale of prescription drugs.

Part III: "Controlled Drugs"

This part of the Act governs what are known as controlled drugs, which are defined as any drug listed in Schedule G. In addition to amphetamines and barbiturates, this Schedule includes about a dozen less commonly used stimulants and depressants. These drugs are used for a variety of medical purposes.

The Act contains only two offences for Schedule G drugs--trafficking, and possession for the purpose of trafficking. Although there is no offence for simple possession, a person found in possession of a large quantity of a Schedule G drug may be charged with possession for the purpose of trafficking. The definition of trafficking used for controlled drugs includes only unauthorized manufacturing, selling, exporting, importing, transporting, or delivering. Unlike the NCA, it does not include "giving" or "administering." However, the recent amendments to the FDA make it clear that a person may be convicted of trafficking in either a controlled or a restricted drug even if no money changes hands. There is no separate offence of importing or exporting; those caught bringing controlled drugs across the Canadian border are charged with trafficking.

Trafficking and possession of a controlled drug for the purpose of trafficking are dual procedure offences, punishable upon summary conviction by a maximum sentence of 18 months' imprisonment and upon indictment by a maximum of 10 years.

Like the NCA, the FDA has been amended to include the offence of prescription shopping. It is now an offence under the FDA to seek a controlled drug from one doctor without disclosing that you obtained controlled drugs from another doctor within the past 30 days. Prescription shopping is a hybrid offence, which if tried by summary conviction carries a maximum penalty of six months' imprisonment or a $1,000 fine for a first offence and a maximum of one year's imprisonment or a $2,000 fine for any subsequent offence. If tried by indictment, the maximum penalty is a $5,000 fine or three years' imprisonment.

Part IV: "Restricted Drugs"

This part of the Act governs restricted drugs, which are defined as any drug listed in Schedule H. Psilocybin, LSD (lysergic acid diethylamide), DMT (dimethyltriptamine), and MDA (methylenedioxyamphetamine) are the most commonly used of the approximately 25 drugs in this Schedule. Unlike controlled drugs, restricted drugs are not used for medical purposes.

There are three offences created for restricted drugs: possession, trafficking, and possession for the purpose of trafficking. This part of the Act adopts the Criminal Code's broad definition of possession that was discussed earlier. Possession of a restricted drug is a dual procedure offence. If the prosecutor proceeds by way of summary conviction, the maximum penalty is six months' imprisonment and a $1,000 fine for a first offence, and one year's imprisonment and a $2,000 fine for a subsequent offence. However, if the prosecutor proceeds by indictment, the maximum sentence is three years' imprisonment and a $5,000 fine.

The definitions of trafficking and possession for the purpose of trafficking are the same for both controlled and restricted drugs. Trafficking and possession for the purpose of trafficking in a restricted drug are also dual procedure offences, punishable on summary conviction by up to 18 months' imprisonment and on indictment by up to 10 years' imprisonment.

Questions and Discussion Materials

1. Why do you think there is no offence of possession of a controlled drug? Should there be a possession offence?

2. Do you prefer the broad definition of trafficking in the NCA or the narrow definition of trafficking in the FDA? Can you suggest two situations that would constitute trafficking under the NCA but not the FDA?

3. Should the definitions of trafficking be the same for both Acts?

4. The maximum sentences under the FDA are much lower than the maximums under the NCA. Do you think these differences can be justified? If not, what changes would you make?

Unauthorized Sale of Prescription Drugs

The FDA's Regulations contain very complex rules governing the manufacture, distribution, and sale of prescription drugs. Unless authorized by the Regulations, these drugs may not be sold without the appropriate verbal or written prescription. Any unauthorized sale constitutes a dual procedure federal offence. If the seller is tried by summary conviction, the maximum penalty is three months' imprisonment and a $500 fine for a first offence, and six months' imprisonment and a $1,000 fine for a subsequent offence. If the prosecutor proceeds by indictment, the maximum penalty is three years' imprisonment and a $5,000 fine.

The Food And Drugs Act: Classifications, Offences, Definitions, and Penalties

Classifications	Drugs in classification	Offences and definitions	Maximum penalty
Part III Controlled drugs: Schedule G	amphetamines barbiturates (other stimulants and depressants)	**Trafficking** — to manufacture, sell, export, import, transport, or deliver any Schedule G drug or any substance held out to be a Schedule G drug	**Summary conviction** — 18 months **Indictment** — 10 years
		Possession for the purpose of trafficking — to possess any Schedule G drug for the above-mentioned purposes	
		Prescription shopping — to obtain or attempt to obtain a Schedule G drug from one doctor without disclosing a prescription for a Schedule G drug obtained from another doctor within the previous 30 days.	**Summary conviction** — First offence: 6 months or $1,000 fine — Subsequent offence: 1 year or $2,000 fine **Indictment** — 3 years or $5,000 fine
Part IV Restricted drugs: Schedule H	LSD MDA DMT psilocybin (other hallucinogens)	**Possession** — to knowingly have a Schedule H drug on your person — to knowingly control a Schedule H drug in another place or within another person's possession — knowledge, consent, and some control over a Schedule H drug in the possession of a fellow group member	**Summary conviction** — First offence: 6 months & $1,000 fine — Subsequent offence: 1 year & $2,000 fine **Indictment** — 3 years & $5,000 fine
		Trafficking — see definition above	**Summary conviction** — 18 months **Indictment** — 10 years
		Possession for the purpose of trafficking — see definition above	
Prescription Drugs	antibiotics tranquillizers birth control pills painkillers (many other prescription drugs)	**Selling** — unauthorized sale of a prescription drug without the appropriate verbal or written prescription	**Summary conviction** — First offence: 3 months & $500 fine — Subsequent offence: 6 months & $1,000 fine **Indictment** — 3 years & $5,000 fine

The Impact of Discretion on the Federal Drug Laws

The preceding review of the NCA and FDA may create an unduly harsh impression of the fate of drug offenders. As in many other areas of the Canadian criminal justice system, the severity of the law is lessened by the discretion exercised by police officers, prosecutors, and judges. Those most likely to benefit from such discretion are young people with no previous criminal record. Such discretion is also most likely to be exercised in cases involving the least serious offences, such as possession of marijuana.

For example, the police may take a teenager, found in possession of a single joint, home to be dealt with by his parents, rather than laying a criminal charge. Possession charges may be laid against only one occupant of a car, even though other occupants also could have been charged. Federal drug prosecutors usually lay a charge of possession for the purpose of trafficking against those caught bringing small quantities of cannabis across the border. By exercising their discretion not to lay importing charges, prosecutors protect such smugglers from a mandatory minimum sentence of seven years' imprisonment. Although possession of cannabis is a dual procedure offence, prosecutors rarely proceed by way of indictment. Judges rarely impose the maximum sentences or anything close to them in cannabis cases. As you will recall, even a first-time cannabis possession offender can be sentenced for up to six months' imprisonment. Yet in 1983, only 7.56% of cannabis offenders were sentenced to imprisonment, and the overwhelming majority of these sentences were for less than one month.

Nevertheless, it should be remembered that you have no control over whether the police, prosecutor, or judge will exercise discretion in your favor. The fact that the police chose to give one cannabis possession suspect a warning does not prevent them from charging you in the same circumstances. Similarly, merely because a judge imposed a lenient sentence in one case does not mean that he or she will give you a lenient sentence.

Questions and Discussion Materials

1. What are the advantages and disadvantages of giving police, prosecutors, and judges such broad discretion?

2. What factors should these officals take into account in exercising their discretion?

3. Is it fair that two people who commit exactly the same offence may be treated very differently by the criminal justice system?

CHAPTER 3: POLICE POWERS OF ARREST, SEARCH, AND SEIZURE IN DRUG CASES

Since the first federal drug law was enacted in 1908, the police have attributed the growth of the illicit drug trade to the drug users' cunning, the shortage of police resources, the courts' leniency, and deficiencies in the law, particularly the lack of adequate police powers. During the last 75 years, police and government officials responsible for drug enforcement have successfully lobbied Parliament for special statutory powers. Consequently, police have broader powers in even a minor drug case than they have in an investigation for murder, arson, or some other serious criminal offence. As we shall discuss in Chapter 10, with the advent of the Canadian Charter of Rights and Freedoms, some of these broad drug enforcement powers have been challenged.

Most of these special powers were enacted during the 1920s, following a campaign to depict addicts as fiendish criminals obsessed with a need to addict others. Canada's opium addict population was small and predominantly Chinese, and the public had little direct contact with, or objective information about, drug users. For the most part, Canadian courts shared Parliament's sympathy with narcotic enforcement officials and broadly interpreted these special powers.

Until the mid-1960s, the federal drug law was enforced almost exclusively by the Royal Canadian Mounted Police (RCMP) drug squads. The annual number of convictions rarely exceeded 500, and all but a small fraction of the charges involved opiates. The dramatic increase in the use of cannabis and other non-opiates in the last 20 years has prompted a parallel increase in enforcement activities. Scores of municipal, provincial, and RCMP officers now invoke the special drug enforcement powers daily, and the targets of these powers are drawn largely from Canada's population of roughly four million cannabis users. As the number of people subjected to the special enforcement

powers increased, so did the complaints and controversies about their use. Few aspects of Canadian drug policy have generated such heated debate. Viewed by critics as wholly unwarranted intrusions on civil liberties, these same powers have been steadfastly defended as an essential tool in the fight against the illicit drug trade.

Canadian Drug Enforcement Powers

The NCA and FDA both contain special powers of search and seizure, although they make no reference to powers of arrest. As indicated earlier, there is a federal law that applies the Criminal Code's procedural provisions, including those relating to arrest, to other federal statutes. Consequently, an officer's authority to search for and seize drugs is largely contained in the NCA and FDA, but his or her power to arrest is governed by the Criminal Code's general arrest sections.

It should be noted that all police, regardless of which police force employs them or what their specific job is, have authority to enforce both federal and provincial laws. In appropriate circumstances, an officer may use all his or her enforcement powers under the Criminal Code, other federal statutes, and provincial legislation in a single investigation. For example, the Ontario highway traffic law authorizes an officer to stop any vehicle at random to determine if the driver has been drinking. If, in the course of this incident, the officer detects the odor of cannabis, the special search powers of the NCA may be used to search the vehicle and all of its occupants. Should the officer find illicit drugs, he or she may lay a drug charge in addition to any other relevant charge.

Police Powers of Arrest

Police officers may arrest you if they have a warrant for your arrest. Even if you are not the person named in the warrant, the officers' conduct is lawful provided they have reasonable and probable grounds to believe that you are the wanted person. However, in most drug cases, the police make a decision based on their own observations at the scene, and arrest the suspect without a warrant pursuant to section 450 of the Criminal Code.

Section 450 of the Criminal Code: Arrest Without a Warrant

Section 450 allows the police to arrest you if they have reasonable and probable grounds to believe that you have committed, are about to commit, or are committing a drug offence. Even if the officers are wrong, their conduct is lawful provided it was based on reasonable and probable grounds. It must be emphasized that you are required to submit to a lawful arrest, even if you are innocent of any wrongdoing.

Whether an arrest is lawful often depends on whether the police had reasonable and probable grounds. In order to resolve this issue, the courts ask whether the facts were sufficient to cause a reasonable man to have a strong and honest belief that the suspect committed the offence. Mere suspicion is not enough. For example, the suspect's prior criminal record by itself does not constitute reasonable and probable grounds. An officer must approach the issue with an open mind and make a reasonable investigation, which may entail listening to the suspect's and witnesses' explanations. Having made preliminary inquiries, an officer must consider the facts, decide on the charge, and then arrest the suspect for that offence.

Questions and Discussion Materials

1. As indicated, you are under a legal obligation to submit to a lawful arrest, even if you are innocent. Is this legal principle fair? What do you think would happen if police powers of arrest were limited to cases in which the police knew with certainty that the suspect was guilty?

2. What does the legal term "reasonable and probable grounds" mean? Can you think of a situation in which the police would have reasonable and probable grounds to arrest a suspect on a drug charge?

Police Powers and Obligations

The law defines not only the criteria for a lawful arrest, but also the way in which the arrest must be made. Even if there are grounds to make a legal arrest, the officer must properly exercise his or her powers in the remainder of the arrest process.

A police officer must inform you of the reason for your arrest at the time of the arrest, unless you are fleeing, resisting, or are incapable of understanding the explanation. In any event, the officer is still obliged to tell you the reason as soon as possible. The Canadian Charter of Rights and Freedoms has imposed an additional obligation upon police to inform you of your right to contact a lawyer without delay.

The law also defines the circumstances in which an officer is entitled to use force. Except in highly unusual circumstances, you must be given an opportunity to submit peacefully. Even if you resist, the officer may use only reasonable force in subduing and arresting you. An officer can only use deadly force in self-defence, to protect someone else from serious injury or death, or to prevent the escape of a fleeing suspect who cannot be stopped in a less violent manner. It is a criminal offence for an officer to use excessive or unnecessary force.

Once an officer has lawfully arrested you, he or she has the right to search you, your personal belongings, and the area within your immediate control for evidence of the offence or a weapon.

A Suspect's Rights and Obligations

Our law makes a fundamental distinction between a suspect's rights before and after a lawful arrest. Until you have been arrested, you are generally under no legal obligation to assist or cooperate with the police. Except in a limited number of cases, you may refuse to identify yourself, account for your presence, answer questions, remain at the scene, accompany an officer, or submit to a search. Basically, you are free to go your own way until you have been lawfully arrested. Your assertion of your right to be left alone does not constitute a criminal offence or, in itself, provide an officer with reasonable and probable grounds to arrest you.

However, once you have been lawfully arrested, you must submit peacefully. If you resist or flee, you may be charged with one of several independent criminal offences, such as obstructing or assaulting an officer, resisting arrest, or escaping lawful custody. Remember that an officer only needs reasonable and probable grounds to lawfully arrest you and that you must submit peacefully even if you are innocent.

Although there are many situations in which you are under no legal duty to cooperate with the police, it would be foolhardy to be hostile. First, if you are hostile to the police, you can expect the same treatment in return. The result may be that a routine matter that could have been easily resolved becomes a time-consuming, unpleasant confrontation for both you and the officer. Second, you might without realizing it commit an offence, such as assaulting or obstructing an officer. The fact that you were innocent of any crime prior to the confrontation does not lessen your criminal liability for these offences. Third, police, prosecutors, and judges have broad discretion that can be used to reduce the impact of a criminal investigation or conviction. Obviously, such discretion would probably not be exercised in favor of a person who was belligerent.

Questions and Discussion Materials

1. What must a police officer tell you when you are arrested?

2. Why is it important for arrested people to be told of their right to contact a lawyer?

3. What limitations are put on an officer's right to use force in making an arrest?

4. When must you submit to a search? Do you think the police should be given the right to search anyone who looks suspicious?

5. Should everyone be required to cooperate with the police, regardless of whether they have been arrested? Would this principle interfere too much with individual freedom?

Police Powers of Search and Seizure in Drug Cases

Police officers in drug investigations have virtually unequalled powers to search private premises. First, they have powers to search under several sections of the Criminal Code, other federal statutes, and provincial legislation. Second, they have special powers of search and seizure under the two federal drug Acts.

The Criminal Code's Search Warrant Provisions

Although these provisions do not apply to drug searches, they provide a basis for comparison with the drug Acts. The Criminal Code authorizes a judicial officer to issue a search warrant based upon information given under oath. The judicial officer must be satisfied that there are reasonable grounds to believe that the specified premises contain an object relating to a Criminal Code offence, anything that will provide evidence of a Code offence, or anything that is intended to be used in a serious offence involving injury to a person. An application for a search warrant must clearly set out the grounds for the officer's belief, the articles to be seized, the place to be searched, and the offence to which the evidence relates.

Unless otherwise provided, the search warrant can only be executed during the day. Officers must have the search warrant with them at the time of the search. Except in unusual circumstances, the officers must show it to the occupant and request entry before using force. The search warrant provides authority to search only the premises, and not its occupants. Any articles the police seize must be brought before the judicial officer and are usually held until the criminal proceedings are over.

The amendments proclaimed in force on December 4, 1985, created a new type of search warrant, called a "telewarrant." In order to apply for a telewarrant, a police officer must believe that an indictable or hybrid offence has been committed and that it is not practical to appear before a judicial officer in person. In such situations, a police officer may telephone a designated judicial officer and swear out the information under oath over the phone. If the judicial officer is satisfied that there are reasonable grounds for the search, he or she will authorize the officer to conduct it. Both the judicial officer and the police officer must complete special telewarrant forms. As in the case of a

regular search warrant, the telewarrant form must be shown to the occupant at the outset of the search, if this is practical in the circumstances. The police officer is also required to file a report within a week of carrying out any telewarrant search.

The legislation makes it clear that telewarrants are intended as a last resort, to be used when the regular search warrant procedures are impractical. It remains to be seen whether telewarrants will be used with such restraint.

Questions and Discussion Materials

1. How do the Criminal Code's search warrant provisions safeguard individual rights?

2. If a police officer comes to your home with a Criminal Code search warrant, can he/she search you?

3. Why does the Criminal Code provide that search warrants ordinarily must be executed during the day?

4. Can you provide an example of a situation in which an officer might seek a telewarrant? Do you think that the legislation governing telewarrants strikes the right balance between protecting individual rights and encouraging effective law enforcement?

The Federal Drug Acts' Special Search Provisions

The NCA and FDA extend police search powers in drug cases beyond the bounds of the Criminal Code. Unlike the Code, the federal drug Acts specifically distinguish between dwelling-houses and other private premises. A dwelling-house is any place where people live, such as a private home, apartment, hotel room, or student's room in a university residence.

Search of Premises Other than Dwelling-Houses

The NCA and FDA authorize police to search without a warrant, day or night, any place other than a dwelling-house in which they believe on reasonable grounds that there is an illegal drug. The Acts give the police the power to act on their own initiative. The officer is not required to seek judicial approval either before or after the search is made.

These special provisions of the drug Acts also allow the police to search any person found in the premises. The police do not need to have any evidence, belief, or suspicion that an occupant is violating the drug law or, for that matter, any law. You are required to submit to a search in these circumstances, despite the fact that you have not been arrested.

In carrying out a drug search, the police are authorized to break in doors, ceilings, floors, containers, and similar objects. They may seize illicit drugs and anything they suspect has been used in, or provides evidence of, an offence. This might include scales, address books, drug paraphernalia, and money.

A convicted drug offender's money and drugs are subject to forfeiture. Under the NCA, a person convicted of possession for the purpose of trafficking, trafficking, importing, or exporting, may also forfeit the car, boat, or plane in which the drugs were carried.

Questions and Discussion Materials

1. What are the differences between the Criminal Code's search warrant provisions and the NCA and FDA provisions for searching places other than dwelling-houses?

2. Under what circumstances could the police rely on these powers to enter a school and search students and student lockers? Should the police have the power to enter schools to conduct drug searches?

3. In what circumstances may the police search you, your car, and your passengers under these drug powers?

Search of Dwelling-Houses

The powers to search dwelling-houses have been limited by the recent amendments. Prior to December 4, 1985, the drug Acts contained two separate provisions for searching dwelling-houses: special search warrants and writs of assistance. Although the special search warrants remain, the government has abolished the writs of assistance.

The writs of assistance were perhaps the most controversial of the special drug enforcement powers. As you will recall, generally the police can only enter and search private property if they have a valid search warrant issued by a judicial officer. This prior judicial review of the police evidence justifying the search is designed to protect the householder's privacy. In contrast, the writ of assistance was a continuing blanket search power. An officer who had been granted a writ was authorized to enter and search, day or night, any dwelling-house without a warrant, if he or she reasonably believed that it contained illicit drugs. In order to prevent the possible destruction of evidence, the writs permitted the police to break in without giving notice, using as much force as necessary.

Although federal court judges issued writs of assistance, they did not have effective control over the process. Once the federal Attorney General applied for a writ on behalf of an officer, the judge was required to issue it to that officer. The writ was not limited as to time or place, and was valid for the officer's entire career. The judge who issued the writ had no control over when, where, how often, or in what circumstances it was used. Judges, as well as other legal professionals, criticized the broad powers that the writs gave to the police.

With the enactment of the Charter, the courts were confronted with the issue of whether the writs violated an individual's constitutional rights and freedoms. This issue was never resolved by the Supreme Court of Canada, but it seems likely that the court would have found that the writs violated section 8 of the Charter, which guarantees individuals the right to be free from unreasonable search or seizure. By abolishing the

writs, the government has apparently responded to public criticism and avoided a potential conflict with the Charter.

Both drug Acts still provide that a judicial officer may issue a search warrant if he or she is satisfied by information given under oath that there are reasonable grounds for believing that a dwelling-house contains illicit drugs. Unlike search warrants issued under the Criminal Code, these special search warrants can be executed day or night and authorize the search of the dwelling's occupants.

It is important to note that the newly-created telewarrants are available in drug enforcement, and may be used in many of the circumstances in which writs were previously available. Telewarrants permit an officer to act quickly when it is impossible to obtain a special search warrant. However, unlike the special search warrants and the writs, telewarrants do not authorize an officer to search the occupants of the premises.

Questions and Discussion Materials

1. Many people believed that writs of assistance gave police too much power. In what ways were writs different from search warrants issued under the Criminal Code?

2. If the police enter your home under the power of a special search warrant, do they have an automatic right to search you and the other occupants? Do they have the right to search through your personal belongings? Would they have the right to take apart your stereo or waterbed in their efforts to find drugs?

3. The police are not required to tell you the reason they believe that there are illegal drugs in your home. Do you think that this is fair?

4. Would you be satisfied if they said that an informant had told them? It should be pointed out that the police are almost never required to divulge the names of their informants. Is this fair? What problems do you think the police would have in getting information if they could be forced to reveal their sources?

5. Do you approve of the abolition of writs of assistance? What do you think of "telewarrants"?

Police Methods of Enforcement

Police face unique problems in attempting to enforce drug laws. In most criminal cases, there is a victim who contacts the police and provides information. Except in very rare circumstances, there is no victim in a drug case. For example, both the buyer and seller of marijuana are willing participants, and both try to keep their activities hidden from the police. The fact that drugs can be easily disposed of makes detection even harder.

The Canadian courts have accepted that the police will have to use unusual and even aggressive enforcement techniques in drug cases. These include the use of paid informants, wiretaps, undercover police officers, entry without notice, trained dogs, strip-searches of suspects, and the granting of immunity to some suspects in return for information about other suspects. The police have also been permitted to grab suspects by the throat without warning in an effort to prevent them from swallowing any drugs that they might have in their mouth.

The courts view most drug offences as serious crimes and have been supportive of police engaged in drug enforcement. This general attitude is perhaps best reflected in a recent Supreme Court of Canada decision that involved police trickery in obtaining a confession from a suspected drug trafficker. Mr. Justice Lamer stated:

> It must be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks and other forms of deceit and should not through the rule (concerning the admissibility of confessions) be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community ... but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a

trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.

Questions and Discussion Materials

1. Do you think that the police should be permitted to use these enforcement methods in all drug cases, regardless of the drug involved and the seriousness of the case?

2. Do you think that the police would be less effective in catching drug offenders if they were not allowed to use such tactics?

3. Do you agree with Mr. Justice Lamer's view of drug offenders?

4. Some people have argued that police use of such methods gives the criminal justice system a bad image, especially among the young. Do you agree?

CHAPTER 4: THE FEDERAL DRINKING AND DRIVING LAWS

The importance of the federal drinking and driving laws cannot be overemphasized. First, drinking and driving is by far the largest single criminal cause of death in Canada. In 1981, an average of seven people were killed and 160 were injured a day in automobile accidents in which at least one driver had violated the federal drinking and driving laws. Research indicates that your chances of being killed in an accident involving a drinking driver are about four times greater than your chances of being murdered. In Ontario, approximately half of all traffic fatalities involve drinking drivers. Second, enforcing the federal drinking and driving law places heavy demands on the criminal justice system. For example, in 1982 the police in Canada laid more than 167,000 drinking and driving charges. A Canadian over 16 years of age is more than twice as likely to be charged with a drinking and driving offence than with any other federal crime. Third, short of staying off the roads, it is impossible to avoid the risks posed by drinking drivers. It has been estimated that on certain nights of the week in North America, as many as 20% of drivers have been drinking and 10% are impaired.

On December 4, 1985, the federal government proclaimed in force a broad package of reforms in the drinking and driving laws. The amendments retained the basic structure of the old legislation, but created several new drinking and driving offences, provided a broader and tougher range of penalties, and established procedures to assist the police in enforcement. In this chapter, we will be discussing five types of drinking and driving offences: (1) operating or having care or control of a motor vehicle while your ability to operate the vehicle is impaired by alcohol or a drug; (2) impaired or dangerous operation of a motor vehicle causing death or bodily harm; (3) operating or having care or control of a motor vehicle with a blood/alcohol level (BAL) in excess of .08%; (4) failing to provide breath or blood samples for analysis; and (5) operating a motor vehicle while disqualified.

It should be noted that several other criminal offences can apply to drinking drivers, depending on the facts of the case. These include failing to stop at the scene of an accident for the purpose of avoiding civil or criminal liability, and dangerous driving.

In the next two chapters, we will discuss some of the more important provincial laws governing alcohol consumption and drinking and driving. At this point you should understand that the provincial laws regulating highways, the licensing of drivers, and alcohol consumption have a major impact on the enforcement of the federal drinking and driving laws. For example, police officers may rely on the provincial highway traffic act to stop motorists and to inspect their driver's licence, insurance, and ownership. It is usually during this process that an officer determines whether there is sufficient evidence to lay a federal charge for impaired driving or to invoke the federal powers to demand a breath sample.

Questions and Discussion Materials

1. Why do you think so many people drink and drive? How would you discourage people from drinking and driving?

2. Some people argue that in order to reduce the number of young people killed or injured by drinking and driving we should raise the legal drinking age and/or prohibit young people from driving at night. Would you favor such changes in the law?

3. Other people have suggested that alcohol advertising should be banned, that the price of alcohol should be increased, and that the number of retail outlets should be reduced. Would you favor these proposals?

The Scope of the Federal Drinking and Driving Offences

Many people assume that they must actually be driving a car on a public road to be charged with a drinking and driving offence. Although most cases arise in such circumstances, you can also be charged while sitting on a snowmobile that is parked on

your own land. In this section, we will discuss three common features of the drinking and driving legislation that contribute to its broad scope.

Location

Drinking and driving offences can occur anywhere. In one case a driver was convicted when his car was found straddling railroad tracks almost 70 metres from the highway. Other drivers have been convicted when they were found on their own property, a vacant lot, or the property of a third person.

The Definition of the Term "Motor Vehicle"

The drinking and driving offences apply to any "motor vehicle." The Criminal Code defines this term as any vehicle, except a train, that is driven by any means other than muscle power. Included in this definition are not only cars, motorcycles, and motorized bicycles, but also snowmobiles, all-terrain vehicles, golf carts, tractors, and even self-propelled lawnmowers. The Canadian courts have held that it does not matter whether the vehicle was capable of moving under its own power at the time of the offence. Thus, drivers have been convicted despite the fact that the vehicle was stuck in mud or snow, out of gasoline, or immobilized by a mechanical problem.

The Definition of the Term "Care or Control"

You can be convicted of a drinking and driving offence not only when you are actually driving, but also when you have "care or control" of a motor vehicle. The Canadian courts have defined "care or control" broadly to include basically any act involving the use of a vehicle, its fittings, or its equipment. If you are found in a vehicle with the ignition keys, or near a vehicle in circumstances suggesting that you intend to drive, you will likely be held to have had "care or control." Thus, an intoxicated driver found asleep in a parked vehicle or an intoxicated driver who approaches his or her car with the keys in hand might well be convicted of a drinking and driving offence on the basis of having "care or control."

A police officer's task of proving that you had "care or control" is greatly simplified by section 241(1)(a) of the Criminal Code. This section states that you will be considered to have "care or control" if you are found in the driver's seat, unless you can prove you did not enter the vehicle "for the purpose of setting it in motion." It has been argued that this section is invalid, because it violates the accused's right to be presumed innocent until proven guilty. This argument is based on the Canadian Charter of Rights and Freedoms, but to date the courts have not generally accepted it.

Questions and Discussion Materials

1. Why do you think the Canadian courts have broadly defined the drinking and driving offences?

2. Is it fair that you can be convicted of a drinking and driving offence on your own property or when your car is inoperable?

3. Provide your own example of a situation in which a motorist would have "care or control" but would not actually be driving.

4. It should be noted that there are similar criminal offences for drinking while boating, or while operating or assisting to operate an aircraft.

The Offences

Impaired Operation of a Motor Vehicle

This offence is contained in Section 237(a) of the Criminal Code, which provides:

> Everyone commits an offence who operates a motor vehicle... or has the care or control of a motor vehicle... whether it is in motion or not, while his ability to operate the vehicle... is impaired by alcohol or a drug....

The key question is whether your ability to operate a motor vehicle has been impaired by alcohol or a drug, not whether you are driving in a careless or dangerous manner. Also, the amount of alcohol or drugs you have consumed is not important. Although it is unlikely, you can be convicted after drinking only one beer, provided it has impaired your ability to drive.

The Criminal Code does not define the word "impaired." This task has been left to the courts, and they have defined the word broadly. Usually the courts try to determine whether the driver had complete control of the vehicle. It is not essential that the driver be visibly intoxicated or drunk.

The quantity of alcohol or drugs necessary to cause impairment differs from person to person. Your weight, amount of body fat, age, sex, state of health, emotional condition, drinking history, and driving experience all influence whether your ability to drive will be impaired.

The police often rely on their own observations in deciding whether to lay a charge of impaired driving. The manner in which the vehicle was being driven, the strong odor of alcohol on the driver's breath, slurred speech, dilated pupils, lack of coordination while producing a driver's licence or getting out of the vehicle, clumsiness in walking, slow or inappropriate responses to questions, and similar factors may all provide evidence of impairment. The police often ask the driver to take a series of coordination tests, such as walking in a straight line or standing upright with eyes closed. Drivers are not required to participate in such tests, and their refusals cannot be used against them. However, once the tests have been taken, the driver's performance can be used in evidence along with the officer's other observations.

The Canadian courts have held that it does not matter whether the accused's impairment is due to alcohol alone, drugs alone, or a combination of both drugs and alcohol. Marijuana and other illegal drugs, prescription drugs, and even common drugstore medicines, such as cold remedies and cough syrups, can all produce impairment. Impairment is especially likely if these drugs are taken in combination with alcohol. With few exceptions, the courts have defined the word "drug" broadly to include any substance or chemical, legal or illegal, that causes impairment. For example, a driver was

convicted of impaired driving when he was found in a stupor caused by inhaling the fumes of airplane glue.

You cannot be convicted of impaired operation of a motor vehicle if you had no way of knowing that you would become impaired. This situation would arise if someone secretly put drugs in your food or your dentist gave you a drug without informing you that it caused impairment. The courts view these cases differently from those in which you knowingly consume alcohol or potentially intoxicating drugs, but misjudge their impact on your ability to drive.

Impaired or Dangerous Operation of a Motor Vehicle Causing Death or Bodily Harm

Prior to December 4, 1985, drunk drivers who caused even fatal accidents were often only convicted of one of the less serious drinking and driving offences, such as impaired driving or having a BAL in excess of .08%. The police seldom charged drivers with the more serious offences of criminal negligence causing death, criminal negligence causing bodily harm, or criminal negligence in the operation of a motor vehicle. This was largely due to the Canadian courts' narrow definition of the term "criminal negligence," which made it difficult to prove these offences.

This problem, coupled with increased public concern over the deaths and injuries attributable to drinking and driving, led to the introduction of two new offences--impaired or dangerous operation of a motor vehicle causing death (section 239(3)), and impaired or dangerous operation of a motor vehicle causing bodily harm (section 239(2)). As we discussed earlier, the courts have broadly defined the concept of impairment, making this element of the offence relatively easy to establish. In addition, it is necessary to prove that the driver's impairment caused death or harm. Impaired or dangerous operation of a motor vehicle causing death is an indictable offence that carries a maximum penalty of 14 years' imprisonment. Impaired or dangerous operation of a motor vehicle causing bodily harm is also an indictable offence, but it carries a maximum penalty of 10 years' imprisonment.

With the enactment of these offences, the federal government repealed the offence of criminal negligence in the operation of a motor vehicle. The offences of

criminal negligence causing death and criminal negligence causing bodily harm were retained, because they are broad in scope and encompass many other situations aside from drinking and driving.

Questions and Discussion Materials

1. Define the concept of impairment. Can you provide examples of when a driver would be impaired?

2. Do you have to be drunk or high to be convicted of impaired driving? Can you be convicted of impaired driving if you can prove that you only had two beers?

3. What kind of evidence do the police rely upon in determining whether you are impaired?

4. Should the police be given the authority to force you to take the coordination tests?

5. Are you in favor of the legislation creating the offences of impaired or dangerous operation of a motor vehicle causing death or bodily harm? What impact do you think this legislation will have on drinking and driving?

Driving with a Blood/Alcohol Level (BAL) in Excess of .08%

This offence is defined in Section 237(b) of the Criminal Code, which provides that:

> Every one commits an offence who operates a motor vehicle... or has the care or control of a motor vehicle... whether it is in motion or not... having consumed alcohol in such a quantity that the concentration thereof in his blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

This criminal offence is based on the quantity of alcohol in your blood. The way you are driving makes no difference. Similarly, it does not matter whether you are visibly intoxicated or your ability to drive is impaired. You can be convicted of this offence if your blood/alcohol level is in excess of .08%.

The amount of alcohol that someone would have to consume to have a blood/alcohol level in excess of .08% varies from person to person. It depends upon such factors as the percentage of body fat, the person's weight, when the person last ate, and the speed at which that person's body metabolizes the alcohol (that is, breaks it down chemically such that it loses its effect). In general, it takes an average male weighing 70 kg (155 lb) a little more than one hour to metabolize a normal-sized drink. Women, to the extent that they have proportionately more body fat than men, will have a higher blood/alcohol level than men of the same weight, given the same amount to drink.

Thus, your BAL depends on how much you drink, how much you weigh, your body type, and how quickly you drink. If our "average" man weighing 70 kg had three drinks in one hour, he would be just about at or above the legal BAL. If the same man had three drinks in an hour, waited an hour, and then quickly had three more drinks, he would have had six drinks in a total of two hours. His BAL would be the same as if he had spaced all six over the two hours. In both cases he would have metabolized only two drinks in this time, and four drinks would remain in his body. He would probably have a BAL in excess of .10%, in spite of having had only three drinks in the last hour.

It is important to keep the concern about your exact BAL in perspective. Even if your BAL is below .08%, you can still be charged with the offence of "driving or having care or control of a motor vehicle while impaired."

Your BAL can be determined by analyzing samples of your urine, blood, or breath. Until the recent amendments, the drinking and driving legislation only authorized the police to demand breath samples from drivers. Although the new legislation empowers the police to demand that motorists provide blood samples, this procedure is strictly limited. Consequently, the vast majority of drinking/driving cases will continue to involve the chemical analysis of breath samples. There are basically two different kinds of machines that can be used to analyze breath samples -- a Breathalyzer machine

and a roadside screening device such as an Alcohol Level Evaluation Road Tester (ALERT).

The Breathalyzer machine forces a sample of the driver's breath through a chemical solution that changes color if alcohol is present. The machine then converts this color change into a reading that indicates the concentration of alcohol in the driver's blood. The Criminal Code provisions concerning the way in which this testing must be done are very complex, but fortunately they are not important for our purposes. The Breathalyzer machine is a relatively large device that is kept at the police station or in a specially equipped police van.

The ALERT is a considerably smaller machine and is less complicated to use. Many police departments place ALERT machines in regular patrol cars. Unlike the Breathalyzer machine, there are some substances other than alcohol that can affect an ALERT reading. Consequently, the ALERT results cannot be used as evidence in court to establish a driver's BAL. Rather, the ALERT machine is used to screen drivers. Those who fail an ALERT test are taken to a police station to have a Breathalyzer test or are held until a mobile Breathalyzer van arrives.

In Ontario, the ALERT machines are set to provide one of three readings. A pass is registered if the driver has a BAL of below .05%; a warning is registered if the BAL is between .05% and .099%; and a fail is recorded if the BAL is .10% or more.

Questions and Discussion Materials

1. Is the fact that you were driving well a defence to a charge of having a BAL above .08%?

2. It has been argued that the law should be changed to make it a criminal offence to drive or have care or control of a motor vehicle with a BAL of .05% or more. What are the advantages and disadvantages of this proposal? Would you favor its adoption?

3. Why are the ALERT results not used as evidence in court?

4. It should be noted that if you are at fault in causing a car accident and are convicted of impaired operation of a motor vehicle or operating a motor vehicle with a BAL in excess of .08%, your insurance company has no legal obligation to pay for the collision damages on your car, even if you have paid for collision coverage.

Refusal or Failure to Provide a Breath or Blood Sample

The Criminal Code authorizes the police to demand breath or blood samples from a motorist in three situations. First, Section 238(2) permits an officer to demand a breath sample for analysis on an ALERT machine from any driver the officer reasonably suspects has alcohol in his or her body. It must be emphasized that officers need not believe that you are drunk, impaired, or committing any offence. Your appearance, the way the car is driven, the smell of alcohol on your breath, slurred speech, clumsiness in getting out of the car, and your own statement that you were drinking all may contribute to creating a reasonable suspicion that you have alcohol in your body. At this point, the officer may demand that you provide a breath sample for analysis on an ALERT or that you accompany him or her for this purpose.

Second, Section 238(3)(a) provides that officers may demand breath samples for analysis on a Breathalyzer machine from any driver they have reasonable and probable grounds to believe is committing or has committed within the last two hours the offence of operating a motor vehicle while impaired by alcohol or driving with a BAL in excess of .08%. An officer may also demand that the driver accompany him or her to the police station for the purpose of taking this test. It should be emphasized that in order to use this power, the officer must have reasonable and probable grounds to believe that the suspect committed or is committing one of these drinking and driving offences.

The ALERT and Breathalyzer provisions are often used together. An officer who stops you needs only a reasonable suspicion that you have alcohol in your body to demand that you submit to an ALERT test. Since a failure on the ALERT indicates that your BAL is at least .10%, these results provide the officer with a basis for demanding that you take a Breathalyzer test. In this way, the ALERT machine can be used to screen large numbers of drinking drivers, only some of whom will be required to take the Breathalyzer test.

Third, as a result of the recent amendments, section 238(3)(b) provides that the police may demand blood samples from drivers in certain limited circumstances. This amendment was prompted by concern that some intoxicated drivers who were incapable of providing breath samples were escaping criminal liability. In order to demand a blood sample, the officer must have reasonable and probable grounds to believe that the driver is committing or has committed within the last two hours either the offence of operating a motor vehicle while impaired by alcohol or the offence of operating a motor vehicle with a BAL in excess of .08%. The officer must also have reasonable and probable grounds to believe that the driver is incapable of providing a breath sample or that it is impractical to obtain a breath sample. Moreover, the blood sample can only be taken by or under the supervision of a doctor, who is satisfied that the procedure will not endanger the driver's life or health.

The new amendments also create a special search warrant that authorizes the taking of blood from drivers who are incapable of responding to a demand for a blood sample. The application for this warrant can be made in person or pursuant to the new telewarrant provisions. In addition to the restrictions imposed above on demands for blood samples, these special search warrants are only available if the driver has been involved in an accident that has resulted in death or bodily harm.

It is a criminal offence to refuse an officer's demand for a breath or blood sample, or to refuse to accompany him or her for this purpose, unless you have a reasonable excuse. Here, the offence is your failure to comply with the officer's demand. The fact that you are driving safely, are innocent of any wrongdoing, and have not consumed any alcohol is irrelevant. The offence is complete when you refuse either to accompany the officer or to provide the sample. The Canadian courts have held that you may be convicted of this offence even though the officer has not explained to you that you are breaking the law by refusing.

The legislation provides that you cannot be convicted for refusing to provide samples if you have a "reasonable excuse." This term is not defined in the legislation, and therefore the courts have been required to determine what constitutes a reasonable excuse. For example, you are not required to comply if the officer's demand is unlawful. A demand would be unlawful if the officer had no basis for making it. The fact that the driver was unconscious or physically incapable of providing a breath sample was, and will

continue to be, recognized as a reasonable excuse for failing to take an ALERT or a Breathalyzer test. However, as indicated, the new amendments create special search warrants that authorize the taking of blood samples from unconscious drivers in certain limited situations. As well, the new legislation permits the police to demand blood samples from drivers who appear to be physically incapable of providing breath samples.

The Canadian Bill of Rights provides that once a person is arrested or detained, he or she has a legal right not to be denied an opportunity to contact a lawyer. The Supreme Court of Canada has held that a driver taken into police custody for the purpose of having a Breathalyzer test is arrested or detained, and thus has a right to contact a lawyer. Moreover, the Court ruled that a police denial of this right provides a driver with a reasonable excuse for refusing to take a Breathalyzer test.

In 1979, the Supreme Court of Canada held that a driver who is requested to take a roadside ALERT test is neither arrested nor detained. The Court adopted a narrow definition of detention -- one that focused on compulsory physical restraint. Since there was no arrest or detention, the driver had no right to legal counsel. Consequently, the Court ruled that a driver who refused an ALERT test because he wanted to first contact a lawyer did not have a lawful excuse for refusing to take the test.

The Canadian Charter of Rights and Freedoms guarantees a person who is arrested or detained a right to legal counsel and also a right to be so informed. In a very recent Charter case, the Supreme Court of Canada appeared to reject its earlier definition of detention. Instead, detention was defined as encompassing any police demand or request that a person would not feel free to ignore. Although this was a Breathalyzer case, the judgment strongly suggests that a driver who is asked to take either a Breathalyzer or an ALERT test is detained, and thus has a right to counsel and must be informed of this right. It may be inferred that a police denial of these rights would now give drivers stopped for an ALERT test a reasonable excuse for failing to provide a breath sample. Although a certain measure of uncertainty remains, this recent case could have a significant impact on drinking and driving enforcement, particularly in jurisdictions in which ALERT machines are used to screen large numbers of suspected drinking drivers.

This Supreme Court of Canada decision was handed down before the new blood-testing provisions came into force. Nevertheless, it would appear that a person who is asked to provide a blood sample would be considered detained, and thus would have a right to counsel and must also be informed of this right. A police denial of these rights would in all probability give a driver a reasonable excuse for failing to take a blood test.

Questions and Discussion Materials

1. Should the police be given the power to demand a breath sample for an ALERT from any driver at random? Would such a power represent too great an intrusion on individual freedom?

2. Provide an example of a situation in which the police would have a reasonable suspicion that a driver had alcohol in his or her body. Give examples of situations in which the police would have reasonable and probable grounds to believe that a driver is committing the offence of impaired operation of a motor vehicle or driving with a BAL in excess of .08%.

3. Should the police be required to explain that it is a criminal offence to refuse to provide a breath or blood sample?

4. Some people would argue that the taking of a blood sample involves too great an intrusion on individual freedom. What arguments would you make in support of the new blood-testing provisions? Do you think that the limitations on these procedures adequately protect an individual's rights? Would you favor extending these special search warrant provisions to any unconscious drinking/driving suspect?

5. Although the new legislation is unclear, it apparently requires doctors to take a blood sample when they are asked to do so by a police officer. Should doctors be forced to participate in the enforcement of the drinking and driving laws? It should be noted that any doctor who complies with an officer's request is protected from both civil and criminal liability.

6. Do you think that the new blood-testing provisions will have much impact on the number of drinking and driving convictions?

Operating a Motor Vehicle While Disqualified

As a result of the recent amendments, section 242(4) of the Criminal Code makes it an offence to operate a motor vehicle if you are disqualified or prohibited from driving by a court, or if you are disqualified or subject to a licence suspension imposed by provincial law. This federal dual procedure offence was created largely in response to concern about the large number of people who continued driving despite court orders and provincial licence suspensions prohibiting them from doing so.

It should be noted that it is also a provincial offence to drive while your licence is suspended. For example, the Ontario government amended the Highway Traffic Act in 1984 to make driving while under a licence suspension a serious provincial offence. A first offender is now subject to a minimum penalty of an additional six-month licence suspension and a $250 fine, and a maximum penalty of an additional six-month licence suspension, a $2,000 fine, and six months' imprisonment.

Questions and Discussion Materials

1. Do you think the new federal law will deter people from driving while disqualified?

2. Is it appropriate for the federal government to make the violation of a provincial licence suspension a federal criminal offence?

3. An Ontario motorist caught driving while under a provincial licence suspension now faces the prospect of being fined, imprisoned, and subjected to additional licence suspensions imposed by both federal and provincial law. Is it fair to punish the offender under both federal and provincial law for a single act?

4. It should be noted that a motorist who drives while disqualified, prohibited, or suspended, automatically loses most of his or her insurance coverage. For example, if you are at fault in causing an accident while under suspension, your insurance company has no obligation to pay collision damages on your car. Although the company will compensate any innocent party you injure, the company has a legal right to sue you for the damages it has paid out.

The Penalties for the Drinking and Driving Offences

In response to public concern over drinking and driving, the recent amendments to the Criminal Code substantially increased the penalties for most of the pre-existing offences, established heavy penalties for the newly created offences, and gave judges the power to impose lengthy driving prohibitions on offenders. These dramatic changes in the penalty provisions are clearly illustrated in the following table.

The Criminal Code clearly provides that those convicted of a second drinking and driving offence are to receive heavier minimum penalties than first offenders. However, in practice this does not always occur. For these heavier penalties to apply, the prosecutor must prove that the offender has previously been convicted of a drinking and driving offence. It may be difficult for the prosecutor to even learn of an offender's previous conviction, let alone prove it. Drinking drivers are not routinely fingerprinted or photographed, and information about these cases is not automatically forwarded to the RCMP's central record system in Ottawa. Thus, a prosecutor may be completely unaware that an accused has a previous drinking and driving conviction, particularly if the driver is from another province. Similarly, if the accused pleads guilty and is sentenced on his or her first court appearance, the prosecutor may not have had enough time to determine whether the accused has a criminal record.

Even if the prosecutor is aware of the offender's previous drinking and driving record and could easily prove it, a decision may be made not to introduce it into evidence. For example, it is unlikely that a prosecutor would introduce your previous drinking and driving conviction if the offence was committed 10 years ago. However, prosecutors have broad discretion in these matters, and practices vary considerably even within one province.

In addition to whatever penalties are imposed under the Criminal Code, a driver may have his or her licence suspended by the province. It must be emphasized that these provincial licence suspensions apply automatically, regardless of the penalties imposed under the Criminal Code for the federal drinking and driving offence.

The Federal Drinking and Driving Legislation*

Offences	Existing Penalties	Penalties Prior to December 4, 1985
Manslaughter†	**Maximum:** life imprisonment; life prohibition from driving	**Maximum:** life imprisonment
Criminal Negligence† Causing Death	**Maximum:** life imprisonment; life prohibition from driving	**Maximum:** life imprisonment
Criminal Negligence† Causing Bodily Harm	**Maximum:** 10 years' imprisonment; 10 years' prohibition from driving	**Maximum:** 10 years' imprisonment
New **Dangerous or Impaired Operation of a Motor Vehicle Causing Death**	**Maximum:** 14 years' imprisonment; 10 years' prohibition from driving	
New **Dangerous or Impaired Operation of a Motor Vehicle Causing Bodily Harm**	**Maximum:** 10 years' imprisonment; 10 years' prohibition from driving	
Impaired Operation of a Motor Vehicle; Operating a Motor Vehicle with a BAL in Excess of .08%; Failing to Provide a Breath Sample on an ALERT or Breathalyzer	**Minimum (summary or indictment):‡** 1st: $300 fine; 3 months' prohibition from driving 2nd: 14 days' imprisonment; 6 months' prohibition from driving Subsequent: 3 months' imprisonment; 1 year's prohibition from driving **Maximum:** **Summary conviction:** $2,000 fine; 6 months' imprisonment; 3 years' prohibition from driving **Indictment:** unlimited fine, 5 years' imprisonment; 3 years' prohibition from driving	**Minimum (summary or indictment):** 1st: $50 fine 2nd: 14 days' imprisonment Subsequent: 3 months' imprisonment **Maximum (summary or indictment):** 1st: $2,000 fine; 6 months' imprisonment 2nd: 1 year's imprisonment 3rd: 2 years' imprisonment
New **Failing to Provide a Blood Sample**	Same as offence immediately above	
New **Operating a Motor Vehicle While Disqualified by the Court or While One's Licence Is Suspended**	**Maximum:** **Summary conviction:** $500 fine; 6 months' imprisonment; 3 years' prohibition from driving **Indictment:** 2 years' imprisonment; 3 years' prohibition from driving	
Failing to Stop, Identify Oneself, and Assist at the Scene of an Accident with the Intent to Escape Criminal or Civil Liability	**Maximum:** **Summary conviction:** $500 fine; 6 months' imprisonment; 3 years' prohibition from driving **Indictment:** 2 years' imprisonment; 3 years' prohibition from driving	**Maximum:** **Summary conviction:** $500 fine; 6 months' imprisonment **Indictment:** 2 years' imprisonment
Dangerous Driving	**Maximum:** **Summary conviction:** $500 fine; 6 months' imprisonment; 3 years' prohibition from driving **Indictment:** 5 years' imprisonment; 3 years' prohibition from driving	Same as offence immediately above

* The amendments repealed the offence of criminal negligence in the operation of a motor vehicle.

† These offences will be used very rarely in drinking and driving cases because of the new offences of dangerous or impaired operation of a motor vehicle causing death or bodily injury.

‡ New Brunswick, Manitoba, Prince Edward Island, Alberta, Saskatchewan, Yukon, and the Northwest Territories have proclaimed in force legislation that gives judges the option of granting these offenders a conditional discharge. The discharge may include an order directing the offender to attend an alcohol or drug treatment program. As we shall discuss in Chapter 9, no conviction is registered against a discharged offender and the listed penalties would not apply.

Questions and Discussion Materials

1. Do you support the increased penalties for the federal drinking and driving offences? Do you agree with the minimum sentences that apply for impaired operation of a motor vehicle, operating a motor vehicle with a BAL in excess of .08%, and failing to provide a breath or blood sample? What do you think will happen to offenders who cannot pay the minimum fines?

2. Will the new penalties deter people from drinking and driving? Do you think that there should be a minimum jail term for all drinking and driving offenders? Given that there were over 167,000 drinking and driving charges laid in 1982, what problems would this policy create?

3. Are you in favor of the new provisions that give judges the power to prohibit offenders from driving? Should a special statutory exception be created for those who need a driver's licence to earn a living?

4. The federal government had proposed, but did not enact, an amendment that would have allowed judges to impound the vehicle of an offender for up to one year. Would you support this proposal? What purpose would it have served?

5. Should the law be changed to make it easier to prove that an offender has previous drinking and driving convictions? Should prosecutors be required to introduce an offender's previous drinking and driving violations?

CHAPTER 5: ONTARIO LAWS RELATING TO DRINKING AND DRIVING

As described in the last chapter, the Criminal Code contains several federal drinking and driving offences. A conviction for any of these offences results in a criminal record, in addition to a fine and perhaps even jail. Unlike the federal government, the provinces have not created specific offences for drinking and driving. Moreover, you cannot get a criminal record for violating provincial law. Nevertheless, the provinces have a major role to play in discouraging drinking and driving.

In this chapter, we will discuss how the police use their broad authority under the provincial traffic laws to investigate federal drinking and driving offences. We will then examine the provincial legislation concerning the suspension of a driver's licence. In most provinces your driver's licence will be suspended following a conviction for certain provincial traffic offences, as well as for any federal drinking and driving offence.

If you need a driver's licence to earn a living, the provincial licence suspension could cause you greater hardship than being sentenced to jail. Once your licence has been reinstated, you may find it impossible to afford automobile insurance. In Ontario, all car owners must carry a minimum of $200,000 worth of liability insurance. Following your first conviction for certain provincial traffic offences or for any federal drinking and driving offence, the Ontario insurance companies will automatically increase your liability and collision premiums by 50% for three years. A second conviction within three years will result in an additional 100% increase in your premiums. Moreover, your insurance company will re-assess your driving record following a conviction, rate you in a higher risk category, and will probably raise your premiums well in excess of the automatic increases. In Ontario, driving without insurance is a provincial offence that generally carries a minimum penalty of a $500 fine. The maximum penalty is a $2,500 fine and a one-year licence suspension.

The highway traffic legislation varies from province to province. In this handbook we have limited our discussion to the Ontario legislation.

Questions and Discussion Materials

1. Can you recall the constitutional reason why the federal government cannot control all aspects of drinking and driving?

2. What would be the advantages and disadvantages of having the same highway traffic legislation in all the provinces?

The Ontario Highway Traffic Act

Police Powers of Investigation

Before 1982, police in Ontario had a legal right to direct traffic and to stop motorists for specific offences such as speeding, but they had no general power to stop cars. Late in 1981, the Ontario government proposed legislation specifically giving police the power to stop cars at random, in order to determine if the driver had been drinking. This legislation came into effect in 1982.

It clearly authorizes the police to stop cars even though there is no reason to believe or suspect that the motorist has broken the law. You must stop when requested to do so by a police officer, even if you have done nothing wrong. If you do not stop, you are committing a provincial offence that carries a minimum penalty of a $100 fine and a maximum penalty of a $2,000 fine and six months' imprisonment. If the court concludes that you wilfully continued to evade police pursuit, your driver's licence will be suspended for three years in addition to any other suspension that is imposed for violating provincial or federal laws.

Once you have been stopped, the officer will ask to see your driver's licence, insurance, and ownership. It is a provincial offence not to carry these documents with you

while driving. If you do not hand over your driver's licence, and you then refuse to give your correct name and address, the officer may arrest you without a warrant.

Police officers will routinely check the licence plate number of any car they stop on a nationwide police computer, even before they get out of the cruiser. This check will reveal if the vehicle has been reported stolen, if there are any unpaid tickets or fines, and if the owner is suspected of involvement in serious criminal activities. Similarly, once the officer has your driver's licence, he or she will return to the cruiser and have your name put through the computer to determine if there are any outstanding warrants for your arrest or other legal problems.

During these inquiries, the police can often gather enough information to exercise other enforcement powers. For example, if the officers detect the odor of cannabis when you roll down your window, the Narcotic Control Act gives them the power to search you, your car, and the passengers for drugs. If the officers notice an open bottle of beer in the back seat, they can use the powers given by the Ontario Liquor Licence Act to search you, your car, and the passengers for alcohol.

This provincial power to stop vehicles at random and inspect the driver's licence, insurance, and ownership is very important in the enforcement of federal drinking and driving laws. Using these powers, the police can screen large numbers of drivers to determine whether they have been drinking.

By observing your driving and by talking to you, an officer can quickly decide if there is sufficient evidence to demand that you provide a breath sample for analysis on an ALERT machine. As indicated in the last chapter, an officer only needs a "reasonable suspicion" that you have alcohol in your body to make such a demand. The way in which you were driving, the odor of alcohol on your breath, slurred speech, clumsiness in handing over your documents, bloodshot eyes, and inappropriate responses to questions would all contribute to the officer's "reasonable suspicion" that you have alcohol in your body.

If you refuse to take an ALERT test, the officer may charge you under Section 238(5) of the Criminal Code. If you take the test and fail, the officer can then demand that you accompany him or her and provide additional breath samples for analysis on a Breathalyzer machine. If you refuse this demand, you can again be charged under Section

238(5) of the Criminal Code with refusing to provide breath samples. If you take the Breathalyzer test and register a BAL in excess of .08%, you may be charged with the offence of driving with a BAL in excess of .08%. This offence is found in Section 237(b) of the Criminal Code.

The Ontario Highway Traffic Act also gives police the authority to inspect any vehicle and carry out examinations or tests that they think are "expedient." During an examination an officer might get into the driver's seat to check the brakes, lights, turn signals, and defroster, lift up the floor mats to inspect for rust holes, look in the trunk to examine the spare tire, and open the hood to check on the various fluid levels. This power provides the police with an obvious means of searching for stolen property, weapons, drugs, and alcohol.

Questions and Discussion Materials

1. Some people argue that the police should not be given the right to stop cars at random because it is an infringement of individual freedom. Do you agree?

2. As a general rule, people are not required to identify themselves to the police. One of the major exceptions to this rule involves drivers, who are required to hand over their driver's licence or give their correct name and address. What arguments would you make in favor of this exception?

3. Should police be allowed to check your licence plate number and name on a police computer without your consent? What are the advantages and disadvantages of permitting the police to carry out such computer checks?

4. The Highway Traffic Act's powers are often used to gather evidence for other provincial or federal offences. Is this appropriate? For example, should the police be allowed to perform a safety inspection on a new car if they are merely using this as an excuse to search for stolen property?

5. As we have discussed, the Ontario Highway Traffic Act gives police broad powers of investigation. You must submit to an officer's lawful

exercise of these powers even if you have done nothing wrong. If you physically resist an officer's attempt to carry out these investigations, you can be charged with the Criminal Code offences of obstructing or assaulting a police officer in the execution of his or her duty.

6. What changes, if any, would you make to the Highway Traffic Act's investigatory powers?

The Provincial .05% BAL Suspension

Your ability to drive may be negatively affected long before your BAL reaches .08%. Until recently, however, the police in Ontario could not prevent motorists with a BAL of less than .08% from driving, unless they could arrest them for a federal or provincial offence. In response to this situation, the Ontario government amended the Highway Traffic Act late in 1981. The new legislation authorizes the police to suspend a motorist's licence for 12 hours if his or her BAL is .05% or more, or if he or she refuses to provide a breath sample upon a lawful demand.

As discussed earlier, refusing to provide a breath sample and driving with a BAL in excess of .08% are both Criminal Code offences. However, driving with a BAL of between .05% and .08% is not against either federal or provincial law. In such cases, the officer will direct you to park and lock your car, and to hand over your driver's licence, which you can retrieve from the police station 12 hours later. If there is no safe place to park, the car will be towed to a police pound at your expense. However, if one of your passengers is a sober licensed driver, the officer may permit that person to drive with your consent, so that you may continue on your way.

Whether or not you have your licence with you, it is suspended for 12 hours. If you are caught driving during this 12-hour period, you will be charged under the Ontario Highway Traffic Act with driving while your licence is under suspension. As pointed out in the last chapter, the maximum penalties for this offence include long licence suspensions, substantial fines, and even lengthy jail terms. The Ontario government has introduced new driver's licences that require a photograph of the driver. This measure should reduce the problem of unlicensed drivers using the driver's licences of friends and relatives.

Questions and Discussion Materials

1. The .05% law has been criticized because it gives police the power to suspend the licence of a driver who has not been convicted of any crime. One alternative to the current law is to make driving with a BAL of .05% or more a provincial or federal offence. Would you favor either of these proposals?

2. What changes, if any, would you make to the provincial .05% licence suspension laws?

Provincial Licence Suspensions

At this point we will review some of the circumstances in which your driver's licence may be suspended pursuant to the Ontario Highway Traffic Act. First, the Act imposes automatic licence suspensions on those convicted of any federal drinking and driving offence. A first offender is subject to an automatic minimum licence suspension of one year; a second conviction results in a minimum suspension of two years; and a third conviction brings a minimum suspension of three years. Any offenders in the last category must also submit a medical report concerning their drinking problems before their licence will be reinstated. If there is evidence that the offender continues to have a serious alcohol problem, the registrar of motor vehicles can suspend that driver's licence indefinitely. The decision to reinstate the licence would be based on several factors, including medical evidence that the offender has overcome his or her drinking problem.

Second, the Highway Traffic Act imposes automatic licence suspensions on motorists convicted of other federal driving offences, such as dangerous driving. Third, the Highway Traffic Act automatically suspends the licences of motorists convicted of certain general federal offences committed by means of a motor vehicle, such as manslaughter, criminal negligence causing death, and criminal negligence causing bodily harm. The provincial government has proposed legislation to extend these provincial suspensions to the newly created federal drinking and driving offences.

Fourth, there are several provincial driving offences that carry automatic licence suspensions, such as careless driving, racing, wilfully evading police pursuit, and driving while your licence is suspended. Fifth, your driver's licence may be suspended if you get too many demerit points for Highway Traffic Act offences, or if you fail to pay your outstanding fines.

Questions and Discussion Materials

1. Is it appropriate to suspend a motorist's licence in each of the circumstances discussed above?

2. Should special consideration be given to people who need a driver's licence to earn a living? Would you favor the creation of a licence suspension that applied only during non-working hours? What administrative and enforcement problems would this create? Would it be appropriate to have a partial licence suspension in the situations discussed above?

3. Do you support the proposed increases in the provincial licence suspensions for the federal drinking and driving offences?

4. As indicated earlier, a person who drives while subject to a federal or provincial disqualification, prohibition, or suspension loses almost all of his or her insurance coverage.

CHAPTER 6: ONTARIO ALCOHOL LEGISLATION

There is a broad range of federal and provincial laws governing the importation, production, sale, and consumption of alcohol. Much of this legislation relates to the taxation and regulation of the commercial alcohol industry. Although these aspects of the alcohol trade are important, our focus in this handbook is on consumer-related issues, such as the legal drinking age. These issues are governed almost exclusively by provincial legislation, and consequently we refer only briefly to the federal alcohol laws in this chapter.

In Ontario, the main body of provincial alcohol law is contained in two statutes: the Liquor Control Act and the Liquor Licence Act. The Liquor Control Act governs the organization of the Liquor Control Board of Ontario (LCBO) and grants it wide powers over the importing, manufacturing, marketing, and pricing of alcohol. In this capacity, the Board deals almost exclusively with companies that make or import wine, beer, and liquor. The Liquor Control Board operates the LCBO stores and regulates Brewers' Retail Stores and private wine and beer stores. These government and privately run stores are commonly referred to as "off-premise" establishments because the alcohol purchased at these outlets cannot be consumed there.

The Liquor Licence Act creates the Liquor Licence Board and grants it authority over bars, taverns, restaurants, and other "on-premise" establishments. The Regulations contain complex provisions governing the kinds of liquor licences that are required for each type of establishment. More important for our purposes, the Liquor Licence Act sets out the legal drinking age, the places where alcohol can be lawfully consumed, the ways in which alcohol may be lawfully transported, and police powers of enforcement.

Questions and Discussion Materials

1. Together, the federal and provincial governments control all aspects of the importation, production, sale, and consumption of alcohol. What should be the goals of our alcohol laws?

2. The alcohol industry is an important part of the Ontario economy. It provides thousands of jobs and is a major source of government revenue. What effect should these features of the alcohol industry have on provincial alcohol policy?

3. Aside from drinking and driving, alcohol consumption figures prominently in both violent and non-violent crimes. Also, alcohol is involved in many accidental deaths and injuries, including those caused by falls, drownings, and fires. The health and social welfare costs of alcohol use run into the hundreds of millions of dollars each year. What effect should these aspects of alcohol use have on alcohol policy?

4. The per capita consumption of alcohol in Ontario has increased during the past 40 years. Should the provincial government attempt to reverse this trend?

5. Which of the following measures should the provincial government adopt to decrease alcohol consumption: introducing public education programs on the risks of alcohol consumption; increasing alcohol prices; reducing the operating hours of on-premise and off-premise establishments; reducing the number of on-premise and off-premise establishments; or rationing of alcohol purchases? Can you suggest other ways the provincial government might reduce alcohol consumption?

6. In the 1985 provincial election, it was argued that the Ontario law should be changed to permit the sale of wine and beer in grocery and variety stores. What do you think will be the effects of such a change? Do you favor this proposal?

Provincial Controls on Alcohol

The Legal Drinking Age

The Liquor Licence Act prohibits those under the age of 19 from drinking, having, purchasing, attempting to purchase, or otherwise obtaining alcohol. It is also an offence for those under 19 to enter certain types of licensed establishments. Selling or supplying alcohol to anyone who you know is under 19 or who appears to be under 19 is illegal.

The Act has created two exceptions to these rules. First, your parents or guardian may serve you alcohol at home or at someone else's residence, even though you are under age. However, this is a narrow exception. For example, your parents may give you a glass of wine with dinner, but they would be breaking the law if they served wine to your friend who was also under 19. Second, 18-year-olds are allowed to "possess" alcohol if it is part of their job at a licensed establishment. For example, an 18-year-old waiter is permitted to serve alcohol to diners in a licensed restaurant.

A person who violates any of the provisions of the Act is guilty of a summary conviction offence that carries a maximum penalty of a $10,000 fine and imprisonment for one year. In addition, a minimum penalty applies to those convicted of selling or supplying alcohol to under-age drinkers. For example, the owners of a bar convicted of this offence will be fined a minimum of $500, and their liquor licence will be suspended for at least seven days.

In order to reduce the problems with serving under-age drinkers, the Ontario government established a system for issuing "proof-of-age" cards. The application forms are available in all government liquor and beer stores. Once you turn 19, you can submit the completed form, required photographs, documents, and fee to the Liquor Licence Board. The Ministry of Consumer and Corporate Relations will then issue you a card that verifies that you have reached the legal drinking age. The Liquor Licence Act provides that a person who has reasonably relied on a patron's "proof-of-age" card cannot be held responsible for violating the laws against serving under-age drinkers. Note that using another person's card, using a false card, or attempting to obtain a card with false

information is a provincial offence that carries a maximum penalty of a $10,000 fine and imprisonment for one year.

Questions and Discussion Materials

1. Should the legal drinking age be raised, lowered, or left the same?

2. Studies indicate that raising the legal drinking age would significantly decrease the number of young people who are killed or injured in automobile accidents involving intoxicated drivers. What effect, if any, does this fact have on your answer to question 1?

3. It has been argued that raising the drinking age to 21 would significantly decrease the use of alcohol by high school students. How does this argument affect your answer to question 1?

4. Some people argue that if 18-year-olds have the right to vote, they should also have the right to drink. Do you agree?

5. Although there is a stiff maximum penalty for drinking under age, there is no minimum penalty. What would be the advantages and disadvantages of introducing a minimum penalty for this offence?

6. What changes, if any, would you make to the laws about serving alcohol to under-age drinkers?

The Place of Consumption

The Liquor Licence Act provides that alcohol may only be consumed in a residence or in a place that has a liquor licence or permit. A residence is defined as any place that is actually inhabited. Houses, apartments, and rooms in dormitories are clearly residences. The attached balconies, porches, and shared hallways are considered to be part of a residence, provided they are not normally open to the public. Motor homes, boats, and even tents are viewed as residences if they are suitably equipped and occupied

as dwellings. However, you should be aware that alcohol consumption is not allowed in some provincial parks. This ban applies even if you are drinking in a parked motor home or a moored houseboat.

In addition to permitting alcohol consumption in a residence, the Act allows you to drink in a place with a licence or permit. As indicated earlier, there are several types of licences and permits, and each is governed by complex regulations. Some of the factors that affect the kind of licence or permit required include the nature of the premises, whether meals are available, the type of alcohol sold, and whether there is entertainment. One basic distinction to note is that you must have a licence to sell alcohol on an ongoing basis, but you need only a permit to sell alcohol for a single occasion or event.

The laws governing where alcohol can be lawfully consumed are frequently broken. For example, it is common for people to have a wine and cheese party at their office without getting a permit or to have beer with a picnic lunch in a public park. It is also common to see people drinking at neighborhood baseball games or at university football games. However, it is important to remember that your liability for violating the law is not lessened by the fact that other people violate the law.

Questions and Discussion Materials

1. Why is it important to have laws restricting the public consumption of alcohol? Should these laws be more stringently enforced?

2. Are these laws too strict? Do you think that they influence people's attitudes towards alcohol?

3. What changes, if any, would you make to these laws?

Public Intoxication

It is an offence under the Liquor Licence Act to be intoxicated in a public place or in part of a residence that is shared with other people, such as the elevator of your apartment building. You may be arrested without a warrant for this offence if the officer believes that it is necessary to protect you or someone else. Such a case would arise if you were found staggering down a deserted country road late at night during a bitterly cold spell. Rather than taking you to a police station and charging you with public intoxication, the officer may escort you to what is known as a detoxification centre. Once at the centre, you may be detained and treated, with or without your consent, until you sober up. Public intoxication is a summary conviction offence that carries a maximum penalty of a $10,000 fine and imprisonment for one year. In addition, these offenders may be detained for up to 90 days in an alcohol treatment centre if the judge believes that they would benefit from treatment.

The Criminal Code makes it an offence to cause a disturbance in or near a public place by being drunk. This summary conviction offence carries a maximum penalty of a $500 fine and six months' imprisonment. As well, those convicted for this offence have criminal records.

Questions and Discussion Materials

1. What is the goal of prohibiting public intoxication? Would you favor a minimum penalty for this offence?

2. Should the police be given the right to arrest anyone who is intoxicated in public, even if the protection of that person or other people is not a factor?

The Transporting of Alcohol

Alcohol may be kept in open or unopened bottles in a residence or in a place that has a licence or permit. In any other place alcohol must be kept in a closed container, and the container must not be in public view. Consequently, it is illegal to walk down a street carrying an unopened bottle of liquor, beer, or wine, unless it is in a bag or is otherwise hidden from view. You may carry alcohol in any part of a car or boat, provided the bottle is unopened, its seal is unbroken, and it is not in public view. If the bottle has been opened, it must be stored with your personal belongings in closed baggage, or stored so that it is not readily accessible to you or your passengers. Thus, when you take wine to a friend's house, the bottle should be unopened and placed inside a bag if you are carrying it in the passenger section of your car. If the bottle has been opened, it should be recorked or recapped and put in the trunk.

Questions and Discussion Materials

1. What are the goals of the laws restricting the display and transportation of alcohol?

2. Are these laws too strict? If so, what changes would you make?

Enforcement Powers

The Liquor Licence Board has broad powers to investigate people who apply for a licence or permit. Once an establishment has been granted a licence, it can be entered without a warrant for inspection at any reasonable time. The Board's inspectors have sweeping authority to examine the entire operation in order to ensure that the Act and the terms of the licence are being followed. Should problems be found, the Board can alter the terms of the licence, temporarily suspend it, or even revoke it.

The Liquor Licence Act also grants police officers extensive enforcement powers. An officer may arrest you without a warrant if you are found violating the Act and you refuse to give your name and address. Even if you provide your name and address, the officer may still arrest you if he or she has reasonable grounds to believe that this information is false. Also, as indicated earlier, you may be arrested without a warrant if you are found intoxicated in a public place and pose a threat to yourself or others.

Police officers may search any vehicle and all of its occupants without a warrant, if they have reasonable grounds to believe that alcohol is being illegally kept or carried in it. For example, if an officer inspecting your driver's licence notices that you are 18 and that there is a case of beer in the back seat, there would be reason to believe that you are in unlawful possession of alcohol. Consequently, the officer would have the right to search you and the entire vehicle. If you resisted the search, the officer could arrest you for the Criminal Code offence of "obstructing a police officer in the execution of his duty." Police are authorized to seize any alcohol that is involved in a violation of the Liquor Licence Act. In this case, it would include the beer and any other alcohol found in the vehicle.

Questions and Discussion Materials

1. What changes, if any, would you make to the powers of the Liquor Licence Board and its inspectors?

2. Should police have the power to demand suspects' names and addresses, and arrest them if they refuse to give them?

3. Should the police have the power to search any passenger simply because they have reasonable grounds to believe that alcohol is being illegally kept or carried in the car?

Legal Obligations of Those Who Provide Alcohol

A person who provides alcohol to others has responsibilities aside from making sure that they have reached the legal drinking age. For example, the Liquor Licence Act makes it an offence to sell or supply alcohol to anyone who is in an intoxicated condition. This provision appears to apply to both licensed establishments and hosts of private parties. The wording suggests that you can be found guilty even if the intoxicated person shows no outward signs of drunkenness.

In addition to being found guilty of serving alcohol to an intoxicated person, you may be held financially responsible for any injuries or damages that this person causes. Generally, one person is not legally responsible for the conduct of another. It is often said that the law does not make you your brother's keeper. However, the court's attitude is changing toward people who serve alcohol to others, particularly if doing so creates an obvious risk of injury. For example, assume you serve alcohol to your guests and several of them become intoxicated. Assume as well that one of them attempts to drive home and you do nothing to stop him. If he falls asleep at the wheel and crashes into a parked car, you may have to compensate the owner of the parked car and even your guest.

Questions and Discussion Materials

1. Are you in favor of the current law that makes it an offence to supply alcohol to someone who is intoxicated? Does this law place too much responsibility on the supplier and not enough on the drinker?

2. Should a host be held liable for the injuries and damages caused by a guest who becomes intoxicated at the host's home?

3. What should a host do to prevent guests from becoming intoxicated or from driving home intoxicated? What should a tavern owner do?

CHAPTER 7: CANADIAN CRIMINAL PROCEDURE

The purpose of this chapter is to explain the basic operation of the criminal justice system from the moment of arrest until sentencing. Given the scope of this topic, we can only briefly discuss the major steps in a typical case. Indeed, it may be inappropriate to talk about a "typical case," because there are so many possible alternative procedures. As indicated earlier, police, prosecutors, and judges have broad discretion that affects how any individual case is handled.

In order to illustrate how the procedures work, we have made up a case and will follow its progress through the criminal justice system. Let us assume that Sally is an 18-year-old high school student who lives at home with her parents, and that she has no criminal record. On the day of her arrest Sally was sitting by herself in a secluded part of a park smoking a marijuana cigarette. Officer Anderson was on foot patrol in the park when he observed her. As he approached, he smelled the burning marijuana and saw the hand-rolled joint.

Apprehension, Arrest, and Processing

In simple cases such as Sally's, the criminal process usually begins with the apprehension of the suspect. Officer Anderson would confront Sally and tell her that she was under arrest for possession of marijuana contrary to the Narcotic Control Act. He would take the marijuana cigarette and label it for later use as evidence. He should also tell Sally that she does not have to say anything, and that any statement she makes could be used against her in court. The Canadian Charter of Rights and Freedoms requires Officer Anderson to inform Sally that she has a legal right to contact a lawyer without delay.

Having lawfully arrested Sally, Officer Anderson would have the legal right to search her and her belongings for evidence of the offence and for weapons. In this case, Sally might only be required to empty her pockets and purse. If additional evidence of a drug offence or any other offence were found, it would be seized and more criminal charges could be laid. We have assumed that the marijuana cigarette was the only evidence.

Although Sally has a legal right to remain silent, Officer Anderson probably would ask her a series of questions and record her answers. First, he would ask for her full name, age, date of birth, address, whether she lived with her parents, and whether she worked or went to school. He might then ask if she had ever been in trouble with the law and, if so, to explain. She might also be questioned about what illicit drugs she had used, how long she had used them, where she got them, and whether her parents knew she took drugs. It should be emphasized that Sally's answers could be used as evidence against her and lead to charges being laid against other people.

Just because Sally is not required to answer Officer Anderson's questions does not mean that she can lie. Lying could result in Sally being charged with additional criminal offences, such as obstructing a police officer in the execution of his duty or public mischief. In any event, the fact that she lied could come out at trial and damage her case. As indicated in Chapter 3, it would also be unwise for Sally to be hostile. Without realizing it, Sally might unknowingly commit the offence of assaulting an officer in the execution of his duty or resisting arrest.

Like many young people in this situation, Sally would probably be upset and unsure of her legal rights and responsibilities. It is difficult to think clearly in such circumstances. Consequently, after identifying herself, Sally should indicate her desire to contact a lawyer and she should speak to the lawyer before answering any of Officer Anderson's other questions.

Officer Anderson must now decide whether to release Sally on what is called an appearance notice or to take her to the police station. In certain minor cases, the police are required to release a suspect on an appearance notice, unless the suspect's detention is necessary to establish his or her identity, to secure or preserve evidence of the offence, to prevent the continuation of the offence, or to guarantee the suspect's

appearance in court. Given the facts, Sally probably would be released on an appearance notice. However, it should be noted that within the rules of the Criminal Code each police department has considerable discretion in designing its own release procedures and policies.

Officer Anderson will fill out the appearance notice, hand one copy to Sally, and explain what it means. The notice will state that Sally is suspected of committing the offence of cannabis possession and that she is required to appear in court on a specific date. It may also require Sally to go to a police station on a given date for fingerprinting and photographing. If Sally fails to appear at the specified time and date for fingerprinting and photographing or fails to appear in court, a warrant may be issued for her arrest. Moreover, unless she has a lawful excuse for not appearing, Sally may be charged with failing to appear--a criminal offence that carries a maximum sentence of two years' imprisonment.

Nothing further is required of Sally until her first court appearance. However, to prepare the case for trial, Officer Anderson must complete various record-keeping tasks, including making sure his notes of the event are complete and accurate, filling out local police department forms and reports, checking to see if Sally has a previous criminal record or any outstanding charges, sending the marijuana cigarette to the drug analyst, completing special federal forms concerning drug offences, and preparing a report for the prosecutor.

Usually, Officer Anderson's reports will be reviewed by a senior officer to ensure that they pose no legal problems. Assuming there are no such difficulties, Officer Anderson would go before a justice of the peace and under oath allege that Sally was in possession of cannabis, contrary to section 3(1) of the Narcotic Control Act. If the justice believes that there is a basis for this charge, he will confirm the appearance notice. If he decides there is no case against Sally, he will cancel the appearance notice and have her informed of this.

If the decision is made to proceed, copies of the police reports and documents are sent to the prosecutor. If the prosecutor believes that the wrong charge has been laid, he or she will have it withdrawn and substitute a more appropriate charge. The prosecutor must also decide whether to proceed by summary conviction or indictment, as

cannabis possession is a hybrid offence. In order to ensure some consistency, the federal Attorney General has issued guidelines to assist drug prosecutors in exercising this discretion. In a straightforward case like Sally's, the prosecutor would not alter the possession charge and would proceed by summary conviction.

Putting aside Sally's case, let us assume that Officer Anderson had arrested a suspect for a more serious offence, such as possession of cocaine for the purpose of trafficking. In such a case, the suspect would almost never be released at the scene, but rather would be taken to the police station. Even after completing the initial investigations, the police may keep the suspect in custody if it is in the public interest to do so. As in Sally's case, the factors taken into account in making this decision are the need to establish the suspect's identity, to preserve evidence of the offence, to prevent the continuation of the offence, and to ensure the suspect's appearance in court.

If the suspect is held in custody, which is usually the case when serious drug offences are involved, he or she would have the right to appear before a justice within 24 hours. At this hearing, generally called a "bail," "interim release," or "show cause" hearing, the prosecutor would try to show why the suspect should be held in jail prior to trial. If necessary, the hearing can be postponed to give the prosecutor more time to collect information about the suspect. After hearing arguments from both sides, the justice would decide whether to release the suspect and, if so, what conditions should apply to the release.

The Court Process

Arraignment

The appearance notice Sally received requires her to come to a specific court on a given day. Sally should contact a lawyer before this date to discuss her case. If she cannot afford a lawyer, she may be provided with some form of legal assistance at public expense. The exact nature and extent of this legal help varies from province to province. We will assume that Sally has hired a lawyer and that they have discussed the case.

When Sally's name is called in court, she will be required to stand before the judge. The court clerk will then read out the charge against her. The judge will ask Sally whether she wishes to plead guilty or not guilty. Since the prosecution's case is strong and Sally has no apparent defence, her lawyer probably would advise her to plead guilty. Nevertheless, Sally must make this decision.

We will assume that Sally pleads guilty. The judge will decide whether to sentence her at this point or to postpone (adjourn) the case for sentencing at a later date. In a more complex or serious case, the judge may adjourn the matter in order to have more time to consider the sentencing issue.

In such cases, the judge may want more information about the offender, and may order the probation department to prepare a "pre-sentence report." If the offender is not being held in custody, he or she will be ordered to report to the probation office for an interview. The probation officer will ask the offender about his or her family background, education, employment situation, financial position, and any previous legal difficulties. The offender may also be questioned about the circumstances that led up to the offence and about any alcohol or drug problems. If the offender consents, the probation officer will contact the offender's family, friends, employers, and/or teachers for additional information. The judge and, in most cases, both the prosecutor and defence lawyer receive complete copies of the pre-sentence report. Judges often rely upon this report in selecting an appropriate sentence.

If Sally pleaded not guilty at her arraignment, the judge would adjourn the case for trial at a later date. Although Sally would be released prior to trial, in more serious cases the accused may be held in custody. Except in unusual circumstances, all court proceedings take place in the courts close to where the offence was committed. If Sally were arrested in Toronto but lived in Sudbury, she would have to come to Toronto for her arraignment and trial. However, there is a procedure by which the case could be transferred to a court closer to Sally's home if she were going to plead guilty.

Trial

In most provinces, Sally's trial would take place before a provincial court judge. If, as we indicated, the prosecutor has proceeded by summary conviction, Sally would not be entitled to a jury trial. Thus, it would be the judge who decides whether or not she is guilty. The prosecutor would present evidence and witnesses first. In our case, the prosecutor would call Officer Anderson to the witness stand to testify as to what occurred and what Sally had told him. The prosecutor would then introduce into evidence the cigarette seized from Sally and a certificate of chemical analysis establishing that the cigarette contained cannabis.

Sally's lawyer would have an opportunity to examine the cigarette and the certificate of analysis. Her lawyer could also question or "cross-examine" Officer Anderson. Sally could testify if she wished to do so, but she could not be forced to. If Sally chose to testify, the prosecutor would have an opportunity to question her. As witnesses testifying under oath, both Officer Anderson and Sally would be under a legal duty to tell the truth. Lying in court is known as "perjury" and is a serious criminal offence.

After both sides have presented their case, the judge would decide whether to find Sally guilty or not guilty. In a complex case, the judge might adjourn to consider the decision and to prepare written reasons. In a straightforward case such as Sally's, the judge would probably state his or her conclusion immediately. Given the facts, Sally would probably be found guilty.

Sentencing

One striking feature of Canadian sentencing law is the broad discretion given to judges. First, there is a wide range of possible sentences that can be imposed for any one offence since most federal offences carry no mandatory minimum sentence and a high maximum sentence. For example, trafficking in a narcotic carries no minimum sentence and a maximum of life imprisonment. Second, our criminal law creates many different kinds of sentences: absolute and conditional discharges; fines; suspended sentences with various probation conditions; jail sentences of less than 90 days that are served on

weekends (intermittent sentences); jail sentences of less than two years, which are served in provincial institutions; and jail sentences of more than two years, which are served in federal penitentiaries. In many cases, the judge is free to combine two different kinds of sentences, such as a fine and imprisonment.

Besides the offence itself, several factors may affect the sentence that is imposed in any given case. The offender's age, family background, work and/or school situation, reputation in the community, and attitude in court are often considered in sentencing. Probably the single most important personal factor is whether the offender has a previous criminal record. The seriousness of the offender's conduct also influences the sentence. The person who shares a joint with a friend and the person who sells large quantities of heroin for profit are both guilty of trafficking. Nevertheless, the sentence imposed in these two cases would vary tremendously so as to reflect the relative seriousness of each offender's conduct. The judge's values and attitudes towards the particular offence may also affect the sentence imposed.

Types of Sentences

Absolute and Conditional Discharges

Once an accused has been found guilty or has pleaded guilty to a federal offence, he or she may be granted an absolute or a conditional discharge provided the judge believes it to be in "the best interest of the accused and not contrary to the public interest." Discharges are further limited to offences that have no minimum sentence and a maximum sentence of less than 14 years. Consequently, discharges cannot be given in trafficking, possession for the purpose of trafficking, or importing or exporting cases under the Narcotic Control Act. Similarly, discharges cannot be awarded for any federal drinking and driving offence, except in Alberta, Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, the Yukon, and the Northwest Territories, which have special sentencing provisions.

No conviction is registered against an offender who is granted a discharge. In effect, a discharged offender is released from the proceedings, rather than being convicted. A more detailed discussion of the criminal record implications of discharges is

provided in Chapter 9. Nevertheless, it should be pointed out here that discharged offenders have a criminal record.

Suspended Sentences

Unlike a discharge, a suspended sentence is imposed only after the offender has been convicted. Having considered the age and character of the offender and the nature and circumstances of the case, a judge may suspend the passing of sentence and release the offender on probation. A suspended sentence cannot be imposed for offences that carry a minimum penalty.

In addition to "keeping the peace" and "being of good behavior," the offender is usually required to report regularly to a probation officer, refrain from using alcohol and drugs, remain in the jurisdiction, and seek employment if unemployed or, if a student, remain in school. A judge has considerable discretion in setting the terms of probation. Offenders can be required to seek treatment for their alcohol or drug problems, to compensate anyone whom they have injured, to work for free on community service projects, and to meet a curfew. If an offender breaches probation, he or she may be arrested, returned to the same judge, and sentenced for the original offence. Moreover, the offender may be charged with the separate criminal offence of breaching probation and receive an additional sentence.

Fine

The Criminal Code contains very complex rules governing when fines may be imposed. It is sufficient to note that judges have considerable discretion in setting the amount of a fine and in determining how much time, if any, will be given to pay it. Offenders who do not pay may be imprisoned, even when they are willing to pay but do not have the money.

Imprisonment

The most serious punishment in Canada is imprisonment. Offenders sentenced to less than two years are held in provincial institutions, and those who receive longer sentences are kept in federal penitentiaries. If the sentence is under 90 days, a judge has the discretion to permit the offender to serve the sentence intermittently. For example, an offender may be permitted to continue working during the week and serve the sentence on weekends.

Sentencing Patterns in Cannabis Possession Cases

In 1983, 67.09% of cannabis possession offenders were fined, 19.83% were given discharges, 7.56% were imprisoned, and the majority of the rest were given suspended sentences and probation. Although only a relatively small percentage of cannabis possession offenders were imprisoned in 1983, that still amounted to over 1,600 people. In addition, about the same number of offenders may have been imprisoned as a result of not paying their fines. Even this total does not include those held in custody prior to trial and those jailed for failure to appear or for breach of probation.

Sally's Case

For the reasons discussed above, it is difficult to predict with certainty the sentence that Sally would receive. Nevertheless, given that Sally is a first offender who is in school, she probably would be fined a relatively small amount, such as $150, or given a discharge. It is important to remember that regardless of the sentence imposed, Sally would have a federal criminal record.

CHAPTER 8: CANADIAN CRIMINAL PROCEDURE AND YOUNG OFFENDERS

In Chapter 7, we looked at criminal procedure as it applied to Sally's case. Since she was 18 years old, she was dealt with as an adult. In this chapter, we will examine how a typical cannabis possession case involving a "young offender" would be processed from arrest to sentencing. Although there are many similarities in the processing of adult and young offenders, there are important differences that deserve detailed discussion. These differences reflect a concern that young offenders need assistance, as well as control and supervision. Before turning to specific provisions, we will briefly examine the development and scope of the Young Offenders' Act (YOA).

The Development of the YOA

Until April 1984, cases involving young offenders were governed by the Juvenile Delinquency Act (JDA). When the federal government first introduced the JDA, it was viewed as a major reform in the criminal justice system. The Act established separate court and correctional facilities for young offenders to protect them from the harmful effects of associating with hardened adult criminals. The Act specifically stated that juvenile delinquents were not to be treated as offenders, but as children in need of "help," "guidance," and "proper supervision." Although few people criticized the goals of the Act, there were many concerns about the way it actually operated.

First, the term "delinquency" was defined to include any violation of federal, provincial, and even municipal law, as well as sexual immorality and similar forms of "vice." As a result, young people were criminally responsible for relatively minor acts that were not crimes if committed by adults. Second, in attempting to maintain flexibility and informality in juvenile proceedings, the Act denied young offenders some

basic rights and protections that were available in adult court. Third, the Act did not establish a uniform age at which a person would be dealt with as a juvenile. For example, in Ontario 16-year-olds were tried in adult court under the Criminal Code, whereas in Manitoba and Quebec they were tried in juvenile court under the JDA. Finally, some people argued that the Act was too lenient, alleging that some young offenders were not held responsible for their crimes and that society needed greater protection.

It is not surprising that after about 80 years, the JDA required a thorough re-examination. Following considerable research and debate, the YOA came into force on April 1, 1984, replacing the JDA.

The Scope of the New Act

The YOA has eliminated the concept of delinquency and provides that a young person can be prosecuted only for a specific federal offence. Young people can no longer be prosecuted under federal law for violating provincial or municipal laws, or for sexual immorality and similar forms of "vice." Thus, in terms of the conduct it governs, the new Act is narrower in scope than the JDA.

The YOA defines a young person as anyone who is more than 12 but less than 18. Under the JDA, children as young as seven were held criminally responsible for their conduct. The new Act has raised the age of criminal responsibility to 12. A child under 12 who commits a crime will be dealt with under the provincial child welfare legislation.

Apprehension, Arrest, and Processing

As in the last chapter, we will make up a situation to illustrate how a "typical case" would be handled under the YOA. It should be remembered that the practices of police, prosecutors, and judges vary from jurisdiction to jurisdiction. At best we can provide only a rough model of how the system works. The fact that the YOA has only recently been introduced makes it even more difficult to predict how any individual case will be processed.

The YOA adopts many of the Criminal Code provisions for apprehension, arrest, and processing. However, it also contains special procedures to safeguard young people's rights.

Consider the case of John, who is a 15-year-old high school student. John has no criminal record and lives at home with his parents. We will assume that Officer Anderson has observed John sitting by himself smoking a joint in a secluded part of a park.

Officer Anderson's initial actions in apprehending John would be the same as those in Sally's case. He would approach John and explain to him that he was under arrest for possession of cannabis contrary to the Narcotic Control Act. The joint would be seized as evidence, and John would be searched for weapons or other evidence of the offence. We will assume that the marijuana cigarette is the only incriminating evidence found.

The YOA not only requires Officer Anderson to inform John of his right to contact a lawyer, but also requires that John actually be given an opportunity to do so. John would also be told that he has a right to remain silent and that anything he says may be used in evidence against him, and that he has the right to contact a lawyer, parent, or other adult before making a statement.

Unlike the JDA, the new Act clearly provides that a young person has the right to be represented by a lawyer throughout the entire process. If a young person cannot afford a lawyer, legal assistance will be provided at public expense. Moreover, the Act attempts to protect the legal interests of those young people who choose not to have a lawyer. For example, before accepting the plea of a young person who does not have a lawyer, the judge must ensure that the person understands the charge and the significance of the proceedings. If the young person does not appear to understand these matters, the judge will enter a plea of not guilty on the young person's behalf. The YOA recognizes that owing to their age, inexperience, and vulnerability, young people have special needs for legal advice and protection.

Officer Anderson probably would ask John a series of questions about his background, experience with drugs, previous legal difficulties, and the offence itself. Although John is not required to answer these questions, if he does so his answers may be

used in evidence against him. As indicated in Sally's case, most young people would be upset in these circumstances and would not know what to do. For these reasons, it would be advisable for John to identify himself and then contact a lawyer before answering any other questions.

Officer Anderson must decide whether to release John on an appearance notice or to take him to the police station. Since the offence is relatively minor, John would probably be released at the scene. Officer Anderson would explain to John that he will be charged with possession of cannabis and that the appearance notice requires him to come to court on a specific date to answer the charge.

Depending on the local police practice, the appearance notice might order John to come to the police station for fingerprinting and photographing. Unlike the JDA, the YOA specifically authorizes the police to fingerprint and photograph any young person charged with an indictable or hybrid offence. These are the same criteria that are used for adults. As noted earlier, the federal drinking and driving offences and the common drug offences are all indictable or hybrid.

The new Act recognizes the right of parents to be informed of any legal measures taken against their child, and the right of a child to be protected by his or her parents. If a young person is arrested and then released, the officer must ensure that the parents are provided with a written notice containing the young person's name, the charge, the time and place of the first court appearance, and a statement that the young person is entitled to legal representation. If a young person is held in custody for any significant time, the police are required to notify his or her parents of the arrest, the reasons for it, and the place where their child is being held.

Except in serious cases, young people are not likely to be held in custody if there is a responsible parent or adult who is willing to look after them. However, even if a young person is detained prior to trial, he or she must be separated from adult prisoners. This provision is designed to protect young people from being exploited or influenced by hardened adult criminals.

As in Sally's case, Officer Anderson will be responsible for a series of record-keeping and related responsibilities. He would also "swear out an information" in youth

court claiming that John was in possession of cannabis contrary to the Narcotic Control Act. Officer Anderson would send copies of the relevant reports to the prosecutor.

There is one important difference between the way in which a young person's case and an adult's is handled. Under the YOA, all offences--whether indictable, hybrid, or summary conviction--are subject to summary procedures. Thus, the prosecutor in John's case must proceed by way of summary conviction, even though cannabis possession is a hybrid offence. In effect, the Act eliminates whatever discretion the prosecutor might have otherwise had. This is not significant in John's case, because cannabis possession is almost always prosecuted by summary conviction. However, it is of considerable importance for indictable offences, such as trafficking, possession for the purpose of trafficking, importing, or criminal negligence causing bodily harm.

The Court Process

Before we turn to John's case, it is necessary to discuss two special procedures for diverting cases from the youth court system. The first involves transferring some serious cases to adult court, where they will be treated like any other adult case. The second involves diverting minor cases out of the system to be dealt with by "alternative measures," which are discussed later in this section.

Transfer to Adult Court

At any time prior to trial, the prosecutor or the young person's lawyer may apply to have certain serious cases transferred to adult court. Because of the much heavier penalties that can be imposed in adult court, a young person's lawyer will rarely apply for a transfer. After hearing both sides and the young person's parents, a youth court judge may transfer a case if it is in "society's interest" to do so. This provision will usually be invoked in only very serious cases, such as murder or armed robbery. The judge must also consider the needs of the young person in making this determination. The Act lists several other factors that must be considered: the seriousness of the alleged offence; the suspect's age, maturity, character, background, and criminal record; and the availability of treatment and correctional facilities. A transfer can only be made if the

suspect was 14 or older at the time of the alleged offence. The judge must provide written reasons for his or her decision, and the decision may be appealed.

Alternative Measures

Under the JDA, the police, prosecutors, and judges often used their discretion to divert minor cases from the juvenile court process. Although this often worked to the young person's benefit and reduced the caseload of the courts, there was little consistency in the way such cases were handled. As well, there were concerns that young people diverted out of the system escaped responsibility for their conduct. The YOA has introduced the alternative measures program to address these problems.

The new Act contains specific provisions that set out criteria and a framework for diverting minor cases. Offenders may avoid some or all of the normal court proceedings by participating in the alternative measures program. These programs might involve community service, essay writing, or work with Big Brothers, Big Sisters, or similar organizations. Each province must select those activities, facilities, and organizations that make up its alternative measures program.

The Act limits the use of alternative measures to cases where it would be appropriate "having regard to the needs of the young person and the interests of society." First offenders involved in relatively minor crimes would be among the most likely candidates. In order to qualify for an alternative measures program, the young person must accept responsibility for the offence and consent to participate. Before being asked to consent, the young person will be informed of his or her right to legal representation. The Act also requires a youth court judge to dismiss any charges brought against an offender who has satisfactorily completed the program.

John's Case

It is most unlikely that the prosecutor would apply to transfer John's case to adult court. Given that John is in school, living at home, and a first offender, he might qualify for an alternative measures program. Because these programs are very new, we

cannot predict with any degree of certainty how they will operate. In large part this depends on the policies adopted by each provincial government.

We will assume that John's case is not transferred to adult court or diverted to an alternative measures program. Consequently, John's case will be processed through the youth court system. As noted earlier, all cases in youth court are tried by way of summary conviction.

Arraignment

The appearance notice John was given requires him to appear in court on a specific date to answer the charge against him. When John's name is called, he will be expected to stand before the judge. The charge will be read out loud, and John will be asked whether he wishes to plead guilty or not guilty. His lawyer probably would advise him to plead guilty, because the case against him is quite strong. If John pleads guilty, the judge may sentence him at this point or adjourn the case to a later date for sentencing. If John pleads not guilty, his case will be adjourned until the trial date. The judge has the power to order John's parents to attend the arraignment and all other court proceedings, if he or she feels it is necessary or in John's interest that they be present.

Trial

If John's case were to go to trial, it would be conducted in much the same way as Sally's case. The prosecutor would call Officer Anderson to the stand to testify, and introduce the cannabis cigarette and the certificate of chemical analysis into evidence. John's lawyer would have an opportunity to examine the exhibits and question Officer Anderson. John would not be required to take the witness stand, but if he did, the prosecutor could question him. After hearing all of the evidence, the judge would have to decide whether John is guilty or not guilty. We will assume that John is found guilty.

There is a major difference between youth court and adult court trial proceedings that should be pointed out. Generally, all proceedings in adult court are open to the public, and the media may report on what occurs. Under the old JDA, all

proceedings in youth court were held in private, and members of the public and media were excluded. Moreover, unless the judge consented, the media were prohibited from publishing any account of juvenile proceedings in which the name or identity of the juvenile would be disclosed.

The YOA attempts to strike a balance between ensuring that court proceedings are open and protecting young offenders from harmful publicity. Unlike the JDA, the new Act permits the public to attend youth court, but the judge has discretion to ban the public from those parts of the proceedings that involve the disclosure of "seriously injurious or prejudicial" information, such as testimony concerning psychiatric assessments. Moreover, no person is permitted to publish any account of a youth court proceeding that discloses the name or identity of the young person.

Dispositions

Like the JDA, the YOA gives judges considerable discretion in sentencing young offenders. However, the new Act provides far more guidelines for exercising this discretion. It should be noted that the YOA uses the term "disposition" rather than "sentence." Dispositions involving jail and probation under the Act must be of a fixed duration, and no disposition can exceed the punishment that would apply to an adult convicted of the same offence.

Before sentencing John, the judge must consider any representations made by the prosecutor, John's lawyer, and John's parents. The judge may require an offender to submit to a medical and psychological examination and require the written reports to be submitted to the court. As well, the judge may request a pre-disposition report. Generally speaking, both the prosecutor and defence counsel will be given copies of these reports.

Types of Dispositions

The YOA lists several types of dispositions that may be imposed. These provisions apply regardless of the offence and penalties that would normally apply to an

adult. A judge may impose more than one type of disposition provided they are not inconsistent.

Absolute Discharge

The judge may grant a young offender a discharge if it is in the young person's best interest and not contrary to the public interest. (For a more detailed discussion of discharges and their effects, see Chapter 9.)

Fine

A young offender may be fined up to $1,000. However, before imposing a fine, the judge must consider the offender's present and future ability to pay it. The offender may be permitted to work off the fine by participating in projects that the provincial government considers acceptable for this purpose.

Compensation and Restitution Orders

An offender may be required to pay the victims of the crime a fixed amount to compensate them for their losses. If the victims consent, the offender may be permitted to satisfy the compensation order by performing personal services for them.

Community Service Orders

The judge may order the young person to undertake a specific community service, such as cleaning up a park or helping a volunteer agency. Unlike the JDA, the new Act contains guidelines for these orders. For example, a community service or compensation order cannot be awarded if it would interfere with the offender's education or normal work hours. A community service or compensation order cannot take more than 240 hours to complete or extend more than 12 months. The person or organization for whom the work is to be done must agree to the order.

Treatment Orders

On the recommendation of a qualified professional, the judge may order an offender detained in a hospital or other facility for the treatment of physical, mental, emotional, psychological, or learning problems. No treatment order can be made unless the offender, the offender's parents, and the treatment centre consent to it.

Probation

An offender may be placed on probation for up to two years. In most cases, an offender will be released under the supervision of a probation officer. In relatively minor cases, an offender may be placed under the supervision of his or her own parents. All probation orders require that during the term of probation the offender be of "good behavior," appear before youth court when requested to do so, and notify the appropriate official of any change in address, employment, training, or education. In addition, a probation order may contain a broad range of conditions that the offender must satisfy, such as: reporting to the probation office; remaining in the area; finding or keeping a job; attending school or a training program; or living at home. The probation order will be read and explained to the offender, who will be asked to sign it, and then will be given a copy.

Custody

The most serious penalty that may be imposed is a custody order. It can only be used for offenders who have committed serious crimes or who pose a threat to the community. The judge must consider the offender's pre-disposition report before making any custody order. Young offenders can only be imprisoned for up to two years, unless their crime is one that for an adult would be punishable by life imprisonment. In these cases, the maximum term of imprisonment for a young offender is three years.

The Act provides for both open and secure custody. If a judge imposes open custody, the offender will be placed in a community residential centre, group home, child care institution, wilderness camp, or similar facility. Closed custody involves detention in

a more traditional correctional facility. The use of closed custody is limited to the most serious and disruptive offenders.

Disposition Review Procedures

The Act contains detailed provisions for reviewing how the offender is adjusting to the disposition. For example, those held on long custody orders are returned to youth court after one year for a review hearing. The provincial authorities are required to prepare and submit a progress report on the offender. The offender is entitled to be represented by a lawyer at the hearing. The prosecutor, the offender's parents, and the relevant provincial officials will also have an opportunity to express their views. There is no automatic review of short custodial dispositions or non-custodial dispositions. If a review seems desirable, the offender, the offender's parents, the prosecutor, or the provincial authorities must apply to the court. A review may be sought for various reasons, such as a significant change in the circumstances that led to the original disposition, the offender's difficulty in fulfilling the disposition, or concern that the disposition is interfering with the offender's employment or educational opportunities.

A youth court judge has considerable discretion to confirm or alter the original disposition. For example, the judge may terminate the disposition and release the offender from any remaining obligations, or ease the conditions of a probation order to permit the offender more time for school or work. As a general rule, the disposition cannot be made more severe than the remaining portion of the original disposition. The one major exception to this rule arises in cases where the offender has wilfully failed or refused to comply with the terms of the disposition, or has escaped or attempted to escape. In these situations, the judge is free to increase the severity of the original disposition, which might involve imposing a custody order, lengthening the term of a custody order, or imposing stricter conditions of probation.

This review process makes it possible to alter dispositions to meet the changing needs of offenders and to protect the public interest. It also gives young offenders a strong incentive to comply with the terms of the disposition.

John's Case

Given the short time the YOA has been in effect, it is difficult to predict the type of disposition that John would receive. The offence is relatively minor, and John has a very favorable background. Since John is in school, the judge would not likely impose a heavy fine, and this is obviously not a case for imposing a custody order. It is more likely that John would be given an absolute discharge, fined a small amount, required to undertake some community service, or be put on probation.

Young Offenders and Criminal Records

The old JDA did not contain detailed provisions governing the accumulation, maintenance, and release of a juvenile's criminal record. As a result, there was considerable public misunderstanding about these records. For example, many people thought that the criminal records of juvenile delinquents were destroyed once they became adults, and others believed that juvenile records could not be used in adult court. Some thought that a person convicted under the JDA did not get a criminal record. Although these views were widely held, they were incorrect. The Supreme Court of Canada clearly indicated that a conviction under the JDA carried virtually the same criminal record consequences as an adult's conviction under the Criminal Code, the Narcotic Control Act, the Food And Drugs Act, or any other federal penal statute. In essence, a juvenile delinquent had a criminal record just like any adult offender.

Moreover, record-keeping practices under the JDA varied greatly from area to area, and there was some concern that police and court information was being released to unauthorized people. There was also some confusion about fingerprinting and photographing juveniles and about whether suspects or offenders could examine the police and court records concerning their own case. The YOA has specifically attempted to eliminate the problems created by the confusion and gaps in the JDA's record-keeping provisions.

Youth Court Records and Police Records

The clerk of the youth court is required to keep a complete record of each case, which is stored separately from adult court records. Except for extremely sensitive information, the offender's lawyer and parents have a right to inspect the entire court record. As well, various law enforcement, corrections, and government officials are given access.

The police also may keep a record, including investigation notes, complaints, and laboratory reports, on any young person suspected of committing an offence. The police department that compiled the record may share this information with other police forces, law enforcement agencies, and court, corrections, and government officials. A young person's lawyer and parents may apply to inspect the police record, but their request may be denied.

Under the JDA, once a young person was charged with an indictable or hybrid offence, a record of this charge was routinely sent to the RCMP central record-keeping facility in Ottawa. This remains the practice with information about adults who have been charged. The YOA appears to prohibit the police from forwarding information about young people to the RCMP central record-keeping facility unless they have been found guilty of an offence.

The Destruction of Records

One major concern about the JDA was that once convicted, a young person would be burdened with a criminal record for the rest of his or her life. Similarly, there were concerns that young people who were arrested and charged under the JDA, but never convicted, could be harmed if this information became public. The YOA specifically addresses both of these problems.

The YOA requires that all court, police, and government records about a young person who is charged with an offence, but who is not convicted, be destroyed. Fingerprints and photographs must also be destroyed. Even if a young person is convicted under the YOA, his or her records will be destroyed, provided he or she is not convicted of

another offence within a specified time period. The provisions for the destruction of records are complex. There is some uncertainty about whether a police officer's notes and general investigation reports must also be destroyed. Regardless of how these issues are resolved, it is fair to say that once an offender's record is ordered destroyed, he or she will no longer have what is known as a criminal record. The YOA specifically states that "a young person shall be deemed not to have committed any offence" once the records are ordered destroyed. Thus, a person whose record has been ordered destroyed may honestly deny having a criminal record.

CHAPTER 9: CRIMINAL AND PROVINCIAL RECORDS

The vast majority of drug offenders and drinking and driving offenders are not sentenced to jail. For many of these people the most serious consequence of being caught is not the sentence imposed, but rather the fact that they get a criminal record.

Unfortunately, there is a great deal of public misunderstanding about criminal records. Even some members of the media persist in stating that those who receive a discharge do not have a criminal record, or that a federal offender who obtains a pardon under the Criminal Records Act no longer has a criminal record. Many young people believed that they did not get a criminal record for an offence they committed under the JDA. As we will discuss, the offender in each of these situations did have a criminal record.

Criminal Records, Provincial Offence Records, and Police Records of Investigation, Arrest, and Charge

The Meaning of the Term "Criminal Record"

One major reason for the confusion about the term "criminal record" is that it has not been defined in any federal statute. Members of the public and the media have used the term to refer to a broad range of different information. Within the legal community, the term "criminal record" is generally used to refer to an official account of a finding of guilt or a plea of guilty for any federal crime. This legal definition is the key to understanding the debate about criminal records and police information systems.

By this definition, if you are found guilty of or plead guilty to any federal offence, you will have a criminal record, regardless of the sentence you receive or the seriousness of the offence. It does not matter if the offence is contained in the Criminal Code, Narcotic Control Act, Food And Drugs Act, Customs Act, or any other federal criminal statute.

Questions and Discussion Materials

1. What would be the advantages of having a law which defines the term "criminal record"? Would you favor adopting the current legal definition as the basis for a new statutory definition?

2. Should young offenders, first offenders, and minor offenders be protected from getting a criminal record?

3. Would you favor creating a pardon that would eliminate an offender's criminal record?

Provincial Offence Records

It is important to distinguish between a criminal record and the record that is kept of those who commit a provincial offence. Although you can be fined and/or imprisoned for violating a provincial law, and a detailed record is made of your offence, you will not get a criminal record. For example, a person convicted of unlawful possession of alcohol under the Liquor Licence Act can honestly deny having a criminal record.

Nevertheless, in some cases, having a provincial record may be as harmful to you as having a criminal record. For example, if you have had several licence suspensions for violating the Highway Traffic Act, you may not be able to get a job that requires driving or to obtain insurance at an affordable price. Similarly, a record involving violations of the Liquor Licence Act may prevent you from getting a job in a licensed

establishment. In the case of a tavern owner, repeated violations of the Act could result in the suspension or revocation of the liquor licence and the closing of the business.

Questions and Discussion Materials

1. Based on our earlier discussions of the Ontario Highway Traffic Act and Liquor Licence Act, can you suggest other examples of the harmful consequences of having a provincial record?

2. Should young offenders, first offenders, and minor offenders be protected from the harmful consequences of a provincial record?

3. Would you favor creating a provincial pardon that would eliminate an offender's provincial record?

Police Records of Investigation, Arrest, and Charge

Although we are concerned primarily with criminal and provincial records, they make up only a fraction of the total information collected in a single case. Potentially harmful information begins to accumulate from a suspect's first contact with the police. This information is widely distributed prior to trial and, with few exceptions, is kept regardless of the outcome of the trial. In order to explain how the police information systems work, we will outline the flow of information in a typical cannabis possession case.

Assume, for this purpose, that a police officer stops you while you are driving. As indicated earlier, the police routinely check the licence number of any vehicle they stop on a nationwide police computer. This computer search will reveal if the car has been reported stolen, if there are any outstanding fines, or if the owner is suspected of involvement in a serious crime. The officer would approach your car and ask to see your driver's licence, insurance, and ownership. The passengers might also be asked to identify themselves, although they are not required to do so. The officer probably would return to

the cruiser and check your name and the names of your passengers on the computer to see if there are any outstanding arrest warrants or other legal problems. Since this information is usually radioed back and forth, anyone with a police-band radio could listen in.

If there were no arrest warrants, other problems, or evidence of an offence, the officer would return your documents and let you go on your way. Nothing would likely come of this incident. However, if one of your passengers was a known drug trafficker, your name might be entered in the local police records and in other police information systems as an associate of a known trafficker. It is unlikely that you would learn of these records.

On the other hand, assume that the officer spots what he believes to be a marijuana cigarette in your vest pocket and arrests you for cannabis possession. The officer would probably search you, the car, and all the passengers. The circumstances leading to the arrest, your name and address, the passengers' names and addresses, and the results of the searches would be recorded in the officer's notebook. Depending on local police practice, the officer would either release you at the scene or take you to the station. In either case, the officer could require you to be fingerprinted and photographed.

Police are authorized to fingerprint and photograph any person who has been charged with an indictable or dual procedure offence. This category includes the common drug offences and all federal drinking and driving offences. However, many police departments do not fingerprint and photograph those charged with drinking and driving offences, and some departments do not routinely fingerprint and photograph all cannabis possession suspects. Thus, whether you would be fingerprinted and photographed depends on the police department's identification policies.

If you are fingerprinted and photographed, the local department would keep copies for its own files and likely forward copies to the RCMP's central police information system in Ottawa. Your name and the details of the case might also be put in local and regional drug information files. This information also might be sent to the drug information networks of the RCMP and Customs. Health and Welfare Canada also

collects information on drug arrests and convictions. All of this information is collected and may be distributed before you appear in court.

If you appear in adult court, the charge against you becomes a matter of public record and may be reported by the media. Taking time off work or school to attend court may cause you difficulty and embarrassment. At this point the arresting officer, the local police, the drug analysts, the RCMP information system in Ottawa, the prosecutor, the court, your lawyer, the Department of Health and Welfare, and perhaps several drug information systems will have produced a record of your arrest and charge. If your case is newsworthy, the details may be broadcast on radio and television or published in the newspaper. Credit reporting agencies that use the media to collect information might also make a record of the incident.

Information from most of these official and unofficial agencies is often widely distributed before your trial and, with few exceptions, these records will be kept regardless of the outcome of your case. Generally, police officers, as well as customs, immigration, corrections, and court officials, can gain access to all these records. Moreover, there are information-sharing agreements between Canadian and foreign police agencies. Even if the charges are dropped or you are acquitted, you have no legal right to examine the police information to ensure that it is accurate. Nor can you force the police to destroy their records. There is little you can do to prevent the further distribution of the media reports of the incident; nor can you compel the media to give equal publicity to the fact that the charges have been dropped or that you have been acquitted.

Questions and Discussion Materials

1. Should the police power to fingerprint and photograph suspects be limited to those who have been convicted? What enforcement problems would this create for the police?

2. Would you favor uniform fingerprinting and photographing policies for all police departments? Should all drinking/driving suspects be fingerprinted and photographed? What about all drug suspects?

3. Should fingerprints and photographs be restricted to the local police department until the suspect is convicted?

4. Should the police be required to destroy the fingerprints and photographs of suspects who are never brought to trial or who are acquitted?

5. It has been argued that the media should have the right to use the names of suspects because the public has the right to know what happens in the criminal courts. Do you agree? How would you balance the public's right to know against the harm such publicity causes an innocent suspect?

6. Should a suspect who is acquitted have the right to demand that the media give as much coverage to the verdict as they did to the charge?

7. What changes, if any, would you make to the laws governing police records and their distribution by official and unofficial sources?

Harmful Consequences of a Criminal Record

There are many potentially harmful consequences of having a criminal record. What happens to any particular offender depends on various factors, such as who finds out about the record and his or her attitude toward it. For example, one employer may be sympathetic to job applicants who admit they have a record, whereas another may refuse to hire them. This element of uncertainty is itself one of the harmful consequences of having a record.

A person with a federal criminal record is at a distinct disadvantage in any subsequent criminal proceeding. Police, prosecutors, and judges are all given broad discretion. Although it is difficult to predict how this discretion will be exercised in any specific case, a person with a criminal record is not usually treated as sympathetically as a first offender. The fact that you have a criminal record may influence the police to lay a charge rather than give you a warning. It may also be used to establish grounds for not releasing you prior to trial, and may influence the prosecutor to proceed by way of indictment rather than by summary conviction in a dual procedure offence. If you appear

in court as a witness, your criminal record may be introduced to cast doubt on your credibility (unless you had received a discharge). Moreover, one of the most important factors that a judge considers in sentencing is whether you have a criminal record. A number of federal offences, including possession of a narcotic and all the drinking and driving offences, carry heavier penalties for a second offence. The fact that you have a criminal record may also affect how you are classified in prison, when you are granted parole, and the terms of your parole.

A person with a criminal record may be denied entry into Canada and other countries. A visitor, and even a permanent resident of Canada in certain cases, may be deported if convicted of a drug offence or other serious offence. A federal conviction may prevent a permanent resident from obtaining Canadian citizenship or a Canadian passport.

Perhaps the greatest concern to young offenders is the impact of their criminal record on employment. It is clear that having a criminal record may limit your job prospects. You may have difficulty passing the security check that is often required for government jobs. Other government jobs are subject to broad hiring criteria that could be used to exclude ex-offenders. The provincial statutes that control professions such as medicine, nursing, dentistry, law, and engineering usually require applicants and members to be of "good moral character" and refrain from "unprofessional, dishonorable or improper conduct." Because these terms are so general, you could easily be denied entry into or forced out of these professions. However, such action is not likely, unless your crime was serious or was related to your professional responsibilities. Similar issues arise for other government-licensed workers such as veterinarians, real estate agents, securities brokers, school teachers, security guards, police officers, funeral directors, and owners of bars, taverns, and other "on-premise" drinking establishments.

Many jobs in private business require bonding or a security clearance, both of which could pose serious problems for an applicant with a criminal record. A person convicted of a drinking and driving offence would be at a distinct disadvantage in applying for any job that required a good driving record. However, whether your offence relates to the job you are seeking may not be that important. Studies indicate that most employers are prejudiced against job applicants who have been arrested for, let alone convicted of, <u>any</u> criminal offence.

Questions and Discussion Materials

1. Is it fair that two offenders with identical criminal records may be treated differently? How would you deal with the uncertainty that now exists concerning the impact of criminal records?

2. It has been argued that once offenders have completed their sentences they have paid their debt to society, and should not be treated differently from anybody else. Do you agree? For example, is it appropriate to impose a heavier sentence on a second offender than on a first offender?

3. Should the government be allowed to discriminate against job applicants with criminal records? Can you suggest some cases in which this would be appropriate and others in which it would not? Answer these same questions concerning private employers.

Limiting the Harmful Consequences of a Criminal Record

Many people have suggested that the harmful effects of having a criminal record should be reduced, particularly in cases involving minor offences. Both the discharge provisions of the Criminal Code and pardons granted under the Criminal Records Act attempt to address this problem. However, contrary to public belief, discharges and pardons provide only limited help.

Discharges

Discharges were introduced in 1972 as a new sentencing option, primarily in response to the large number of young first offenders who were acquiring criminal records for cannabis possession. Following a guilty plea or a finding of guilt, a judge may grant an offender an absolute or conditional discharge, provided it is in "the best interests of the accused and not contrary to the public interest." The Criminal Code provides that discharges can be granted only for offences that have no minimum sentence and a maximum sentence of less than 14 years. Consequently, discharges cannot be given for

trafficking, possession for the purpose of trafficking, importing, or exporting under the Narcotic Control Act. Nor can discharges be given for any federal drinking and driving offence, except in Alberta, Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, Yukon, and the Northwest Territories.

A discharged offender can honestly deny having been convicted of a criminal offence, because no conviction is registered. The criminal record of a discharged offender--unlike that of a convicted offender--cannot be raised to cast doubt on his or her credibility if he or she testifies in any court. It has been held that an offender's prior discharge should not be considered in sentencing, except in cases where the offender is seeking another discharge.

However, a discharge has no impact on police and other records that accumulate prior to trial; nor does it limit the subsequent distribution of this information. While discharged offenders can deny having been convicted, they must answer "yes" if asked whether they have been arrested for, pleaded guilty to, been found guilty of, or been sentenced for a criminal offence. A discharged offender has a permanent criminal record that he or she cannot honestly deny. Unfortunately, there have been several misleading newspaper, radio, and television reports suggesting that discharged offenders have no criminal record. This is wrong. A discharge does not eliminate your criminal record. Rather, in certain circumstances it may reduce the harmful impact of having a criminal record.

The Criminal Records Act

The Criminal Records Act allows a federal offender to apply for a pardon after waiting a specified time. Usually the RCMP will investigate the applicant's present family and employment situation and forward their findings to the parole officials. A federal offender automatically loses certain rights, such as the right to hold public office and to enter into contracts with the federal government. The granting of a pardon merely "vacates" an offender's conviction or discharge, which means that it removes these disqualifications. However, a pardon does not alter the fact that the offender committed a crime. Consequently, pardoned offenders cannot truthfully deny having a criminal record. They must also answer "yes" if asked whether they have ever been convicted of or

discharged for a criminal offence. For what it is worth, pardoned offenders may point out that they have been granted a pardon.

The Criminal Records Act does not eliminate a pardoned offender's criminal record, but rather dictates how it is to be stored and released. The records of the pardoned offender must be sealed and separately stored. They cannot be released without the approval of the Solicitor General. These provisions apply only to the records held by federal authorities, and not to local and provincial police files or provincial court records.

Limiting the distribution of a pardoned offender's record may not be that helpful. First, although the provincial authorities usually cooperate in limiting access to official sources, most of the information has been widely distributed even before the offender is eligible for a pardon. Thus, the offender's reputation and job prospects may already be seriously harmed before a pardon is issued. Second, a pardon does not prevent the media from making reference to the conviction. Third, a pardoned offender cannot honestly deny that he or she has a criminal record.

Perhaps the greatest benefit of obtaining a pardon arises when you seek a federal government job. Except in a limited number of circumstances, no federal job application form can ask a question that would require a pardoned offender to reveal an offence for which a pardon has been granted. The Canadian Human Rights Act extends some of this employment protection beyond the application stage. However, if the job you are seeking requires a security clearance--and many government jobs do--you might be required to reveal your criminal record at some point in the hiring process.

Several provinces have enacted legislation that prohibits discriminating against pardoned offenders in employment, housing, and the provision of services, goods, and facilities. As well, several provinces have prohibited credit reporting agencies from distributing information about an offence for which a person has been pardoned.

The Need for Record-Keeping

By making certain conduct an offence, the federal government sets in motion a process that generates a great deal of information, both before and after trial. This

elaborate record-keeping system is needed to maintain the accuracy of the process, to provide police with criminal intelligence information, to allocate enforcement resources, and to evaluate the criminal justice system. These record-keeping systems cannot be dismantled. Nor can we allow our police and courts to operate in secrecy beyond the scrutiny of the public and media. One result of these features of our criminal justice system is that it is impossible to eliminate all of the harmful consequences of being arrested, charged, and convicted of a federal offence.

Questions and Discussion Materials

1. Should discharges be made available for a broader range of offences?

2. What restrictions, if any, should be imposed on the distribution of a discharged offender's record?

3. Would you favor creating an automatic discharge for certain offences?

4. Should the current provisions be changed to permit a discharged offender to deny having a criminal record?

5. Would you favor the creation of an automatic pardon for certain offences?

6. Would it be more appropriate to destroy the records of pardoned offenders, rather than sealing and separately storing them?

7. Should the current provisions be changed to allow a pardoned offender to deny having a criminal record?

8. Should police and private employers be prohibited from discriminating against discharged or pardoned offenders?

9. Should the media be prohibited from making further reference to the records of discharged or pardoned offenders?

10. Some of the proposals set out above would have a significant effect on police record-keeping practices, the rights of employers to hire whom they wish, and the freedom of the press. What weight should these factors be given in answering the above questions?

CHAPTER 10: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

With the proclamation of the Constitution Act on April 17, 1982, the Canadian Charter of Rights and Freedoms came into force, adding a new dimension to all federal and provincial laws. The purpose of this chapter is to discuss the legal protections contained in the Charter and their effect on Canadian drug and alcohol laws. The impact of the Charter will gradually emerge during the next five to ten years as the Supreme Court of Canada interprets and applies it. Consequently, we will only discuss the general lines of argument that arise in Charter cases involving alcohol and drug laws, rather than specific legal details.

The Charter in Perspective

The enactment of the Constitution Act has been praised as representing Canada's "coming of constitutional age." Now, like the United States and many other nations, Canada has a written constitution in which specific rights and freedoms are guaranteed. The Charter came into force following elaborate proclamation ceremonies and celebrations that were major public events. The first court cases involving the Charter, particularly those in which it was broadly interpreted, were given positive media coverage. In such an atmosphere, it is easy to overlook the fact that much of the Charter is not new. Canadians had many of these very same rights long before they were enacted in the Charter.

Since the time of the Magna Carta in 1215, English law recognized many individual liberties and protections. For example, the right to use force in resisting unlawful arrest and the limitations imposed on police in searching suspects and entering

private premises have been part of our legal heritage for hundreds of years. During the last 90 years, the Canadian Parliament has included many of these principles in the Criminal Code and other federal statutes, thereby providing an additional source of legal protection. For example, Section 26 of the Criminal Code clearly prohibits the use of excessive force in law enforcement, and Section 29(2) requires anyone who makes an arrest to inform the suspect of the reasons for the arrest.

The Canadian Bill of Rights provides a third source of individual liberties. Introduced with great enthusiasm by the Diefenbaker government in 1960, the Bill represented Parliament's first attempt to ensure that certain fundamental rights would take priority over federal legislation. Unfortunately, the Bill has had little effect in safeguarding individual rights and freedoms. In part, this result was due to the wording of the Bill and the fact that it was not made part of the Canadian Constitution. However, this result was also due to the Canadian courts' narrow interpretation of the Bill of Rights.

The attitude of the courts may have far-reaching implications for the Charter. As indicated, most of the legal rights and freedoms guaranteed by the Charter have been recognized in the Bill of Rights, statutes, and old cases. Naturally, in analyzing the Charter, the courts will turn to these existing sources. The Canadian courts' narrow definition of individual rights and freedoms in these earlier authorities will affect how these same principles are interpreted in the Charter. For example, having defined the term "cruel and unusual treatment or punishment" in Section 2(b) of the Canadian Bill of Rights, the Supreme Court of Canada is most unlikely to give that term a significantly different interpretation now that it is included in Section 12 of the Charter.

Questions and Discussion Materials

1. What are the advantages of having a written document, such as the Charter, that sets out your legal rights and freedoms?

2. Prior to the enactment of the Charter, how were the rights and freedoms of Canadians protected? It should be noted that these earlier sources of legal rights remain in effect, unless they conflict with the Charter. In such cases, the Charter's provisions would be followed.

3. Do you think it is important for Canadians to understand the Charter and the rights and freedoms it contains? If so, how can the federal and provincial governments accomplish this goal?

The Charter's Status, Limitations, and Remedies

The Charter's Status

The Charter of Rights and Freedoms is a significant improvement over the Bill of Rights. As part of the Constitution Act, the Charter is specifically made part of the supreme law of Canada. This means that the courts have the power to strike down any law that conflicts with the Charter. Unlike the Bill of Rights which applies only to federal legislation, the Charter applies to both federal and provincial laws. Moreover, the Charter can only be changed by constitutional amendment procedures, whereas the Bill can be amended or even repealed by Parliament through ordinary legislative action. In terms of its constitutional status and effect, the Charter clearly gives the courts far greater power to protect legal rights than does the Bill of Rights. However, it remains to be seen how the Canadian courts will use these opportunities.

The Charter's Limitations

The Charter contains two major limitations on the legal rights and freedoms that it guarantees. Section 33 of the Charter permits Parliament and the provincial legislatures to "override" these legal rights and freedoms. In order to invoke this power, Parliament or the provincial legislature must expressly declare that a law is to operate in spite of the Charter. Although such a declaration ceases to have effect after five years, there is no restriction on the number of times it can be re-enacted.

Section 1 of the Charter imposes an additional limitation on the Charter's legal rights and freedoms. It basically provides that these Charter guarantees are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In other words, Section 1 excuses certain violations of rights and freedoms. Thus, even if you can prove that the police violated your constitutional rights

in arresting you, you may not be entitled to a remedy. If the prosecutor can prove that this violation was provided for by law, was reasonable in the circumstances, and is clearly justifiable in our kind of society, then the court will excuse or permit the violation.

Section 1 is so broadly worded that the courts have great discretion in applying the Charter. If the courts continue their cautious approach, they could use Section 1 to justify many infringements on civil liberties. Alternatively, Section 1 could be interpreted as requiring strict proof that the goal of the challenged legislation could only be achieved by infringing upon your rights, and that this goal must take priority over your rights. Predicting the Charter's impact will remain a matter of speculation until the Supreme Court of Canada defines Section 1.

Remedies under the Charter

A major advantage of the Charter is that it not only guarantees certain rights and freedoms, but also sets out ways to ensure that they are respected. Basically, if there has been a violation of your legal rights and freedoms that cannot be excused by Section 1, you may apply to a judge for an "appropriate remedy." Thus, the courts have considerable flexibility in shaping a remedy to meet the circumstances of each case. The remedies may include a damage award, or a declaration that an otherwise proper law no longer has any "force or effect" because it conflicts with the Charter.

Section 24(2) of the Charter provides the remedy that is most likely to be sought in any criminal case; namely, that evidence obtained in violation of the accused's rights be excluded from the trial. Police officials and others have argued that this "exclusionary rule" will greatly hamper law enforcement. However, it is important to realize that this rule is narrower than it appears. The accused must establish, first, that the police violated his or her legal rights under the Charter, and second, that the evidence was obtained as a result of that violation. Remember, the prosecutor may argue that Section 1 of the Charter permits the violation. If the prosecutor's argument is accepted, the evidence is admissible. Even if the violation is not excusable under Section 1, the evidence will be admissible under Section 24(2) unless the accused can prove that its admission "would bring the administration of justice into disrepute."

Although the Canadian "exclusionary rule" is considerably narrower than its American counterpart, it has fundamentally changed Canadian law. Prior to the Charter's enactment, the fact that the police acted illegally in seizing evidence very rarely had any effect on the admissibility of that evidence. With few exceptions, illegally obtained evidence was admissible, provided it was relevant to the case. Clearly Section 24(2) gives the Canadian courts far greater power to exclude evidence.

Questions and Discussion Materials

1. Explain in your own words the major differences between the Canadian Charter of Rights and Freedoms, and the Canadian Bill of Rights.

2. How important are these differences in protecting individual rights and freedoms?

3. There has been a great deal of opposition to the "override" power in Section 33 of the Charter. It has been argued that Parliament and the provinces should not have the power to enact laws that violate guaranteed rights and freedoms. Do you agree with this argument? Can you suggest situations in which it would be appropriate for Parliament or the provincial legislatures to use Section 33?

4. Explain in your own words how Section 1 of the Charter operates.

5. Explain in your own words how Section 24(2) of the Charter operates.

6. Some people have argued that the exclusionary rule in Section 24(2) does not give sufficient consideration to the accused's rights. Other people have argued that this section will hamper law enforcement. Has Section 24(2) struck an appropriate balance between these competing interests?

The Charter's Legal Rights and Freedoms

The Canadian Charter of Rights and Freedoms protects a broad range of interests: freedom of religion, freedom of association, freedom of peaceful assembly, freedom of the press, democratic rights, mobility rights, equality rights, language rights, education rights, and legal rights. Although all of these interests are extremely important in our society, it is the legal rights that are most relevant to our discussion of Canadian drug and alcohol laws. These legal rights are set out below as they appear in the Charter.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention
    (a) to be informed promptly of the reasons therefor;
    (b) to retain and instruct counsel without delay and to be informed of that right; and
    (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right
    (a) to be informed without unreasonable delay of the specific offence;
    (b) to be tried within a reasonable time;
    (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
    (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
    (e) not to be denied reasonable bail without just cause;
    (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
    (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence

under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

The Charter's Impact on Drug and Alcohol Laws

Despite its recent enactment, the Charter has been argued in thousands of alcohol and drug cases across Canada. The vast majority of these cases have been decided by trial courts. There are numerous conflicting judgments, and it will take the appeal courts and the Supreme Court of Canada years to resolve these issues. In this section, we will focus on only some of the more interesting and important issues that have arisen to date.

Specific Constitutional Cases: Drug Laws

Writs of Assistance

It has been argued that the writs of assistance are unconstitutional in that they violate sections 7 and 8 of the Charter. The major concern was that the writs authorized the police to search a home without a search warrant and thus without any

prior judicial scrutiny. Some courts have upheld the constitutional validity of searches made pursuant to the writs, if it was impractical for the officer to apply for a warrant. Other courts, including the Ontario Court of Appeal, have struck down the writs. These latter decisions are consistent with the growing number of cases that have held other legislation authorizing warrantless searches to be unconstitutional. The recent amendments to the drug Acts have abolished the writs of assistance, and their constitutionality may never be resolved by the Supreme Court of Canada. Nevertheless, the issues posed by the writs are relevant to other sections of the drug Acts.

Warrantless Searches of Premises Other than Dwelling-Houses

Both drug Acts authorize the police to search premises other than dwelling-houses without a warrant, if they reasonably believe that the premises contain illicit drugs. As with the writs of assistance, the main criticism is that the legislation authorizes the search of private property in the absence of prior judicial approval. The Ontario Court of Appeal stated that an officer's reasonable belief that illicit drugs are on the premises is not enough to meet the requirements of section 8 of the Charter. In the absence of exceptional circumstances making it impractical to obtain a search warrant, warrantless searches violated section 8. Some courts have adopted a similar position, whereas others have upheld these search provisions. Ultimately, the Supreme Court of Canada may have to resolve the issue.

The new Criminal Code provisions creating "telewarrants" permit an officer to obtain judicial approval for a search over the telephone. Telewarrants are available in any case in which the officer believes that an indictable or hybrid offence has been committed and that it is not practical to apply for a search warrant in person. Given the availability of telewarrants, the Ontario Court of Appeal and some other courts might conclude that only warrantless search under the drug Acts are unconstitutional.

Random Searches of Occupants During Drug Raids

As indicated, both drug Acts authorize the police to enter and search homes and other premises in certain circumstances. In addition, the Acts give the police the

right to search any occupant of these premises, even if there is no reason to suspect that the person has violated the drug law or, for that matter, any other law. Thus the Acts permit the police to search occupants of raided premises at random. This special statutory power stands in sharp contrast to the general principles of search and seizure. An officer's power to search suspects is usually limited to cases in which the suspect has been lawfully arrested or has consented to the search.

These special search powers under the drug Acts have been challenged as violating sections 7 and 8 of the Charter. The courts have struggled to limit these powers in a manner consistent with the Charter. For example, the British Columbia Court of Appeal indicated that a search of an occupant would only be constitutional if the officer had a reasonable belief that the occupant was in possession of illicit drugs. Similarly, the Nova Scotia Court of Appeal concluded that the police had no right to search any person unless they had reasonable grounds to believe that he or she was committing an offence. However, other courts have upheld the constitutional validity of random occupant searches. Again, this issue may have to be resolved by the Supreme Court of Canada.

Police Use of Throat-Holds and Intimate Physical Search

The Charter applies not only to whether an officer can make an arrest or search, but also to the way in which the arrest or search is carried out. Since evidence of a drug offence is often easy to conceal or destroy, the police sometimes use violent and intrusive search techniques. The use of choke-holds and intimate physical searches has been challenged as violating sections 7 and 8 of the Charter. In general the courts have upheld the use of these tactics, provided the officer had reasonable grounds to believe that the suspect was carrying drugs and the officer used no more force than was reasonably necessary.

Even when the police have violated the Charter in searching the accused, the courts have often admitted the evidence seized by the police. Consequently, the accused have been convicted, despite the police misconduct. It must be remembered that the courts will only exclude evidence obtained in violation of the Charter if the admission of that evidence would, in all the circumstances of the case, bring the administration of

justice into disrepute. To date, the courts have been reluctant to exclude evidence of drug offences unless the police conduct was truly shocking.

Specific Constitutional Cases: Federal Drinking and Driving Laws

The Criminal Code provisions governing drinking and driving were frequently challenged as violating sections 7, 8, 9, 10(b), 11(c), 11(d), and 13 of the Charter before the recent amendments. Undoubtedly, the new legislation will trigger another round of constitutional challenges. As in all discussions of the Charter, it is important to realize that many issues will remain unresolved until they are squarely dealt with by the Supreme Court of Canada. Although some lower courts have found particular aspects of the federal and provincial drinking and driving laws to be unconstitutional, the majority of challenges have failed. The general attitude of the Canadian courts is perhaps best summarized in the following statement of the Ontario Court of Appeal:

> In view of the number of cases in Ontario trial courts in which Charter provisions are being argued, and especially in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to observe that the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter, which is a part of the Supreme law of this country.

However, certain features of the drinking and driving laws and the techniques used to enforce them raise serious constitutional problems. We will briefly discuss section 7 and licence suspensions, section 8 and the taking of breath and blood samples, and section 10(b) and police demands for breath and blood samples.

Section 7 and Licence Suspensions

Section 7 guarantees everyone the right to life, liberty, and security of the person and the right not to be deprived of these rights except in accordance with principles of fundamental justice. For our purposes, fundamental justice may be seen as a synonym for procedural fairness. The courts have generally found that a licensed motorist's right to drive is an aspect of his/her liberty, and thus is protected by section 7. Consequently, motorists cannot be deprived of their right to drive, unless fair procedures

have been followed. It is on this basis that motorists have challenged the federal and provincial legislation authorizing licence suspensions, prohibitions, and disqualifications.

The courts have resolved these challenges by examining whether the suspension, prohibition, or disqualification was reasonable given its purpose and the nature of the offence from which it flowed. A licence suspension, prohibition, or disqualification, imposed as a result of a drinking and driving conviction is considered a reasonable consequence of breaching the law and thus satisfies the requirements of procedural fairness in section 7. However, the issue is not as simple when the legislation authorizes the police to temporarily suspend a motorist's licence at roadside.

The British Columbia Court of Appeal has recently examined whether such temporary licence suspensions violate section 7 and, if they do, whether they can be justified as a reasonable limit under section 1 of the Charter. In this case, it was argued that section 214(2) of the British Columbia Motor Vehicle Act, which gives police very broad powers to suspend a motorist's licence for 24 hours, violated section 7 and that it could not be justified under section 1. The legislation allowed the police to suspend the licence of any driver if they had reason to suspect that he or she had consumed alcohol. The suspension was based solely on the officer's subjective opinion that the driver had consumed alcohol in some amount, at some earlier time. There was no need for breath analysis results, evidence of improper or dangerous driving, or any indication of intoxication or impaired driving. The legislation did not require that the motorist be given any notice, hearing, or opportunity to explain. The Court of Appeal concluded that the legislation deprived motorists of their right to drive in breach of the principles of procedural fairness. It also concluded that this violation of section 7 could not be justified under section 1, because the legislation gave the police vague, unfettered, discretionary powers.

Nevertheless, the court emphasized that legislation authorizing temporary licence suspensions could be justified under section 1, if it was limited to cases involving evidence of unsafe, dangerous, or impaired driving. In the words of the court:

> A law (like s. 214(2)) would, however, be a reasonable limit within the meaning of s. 1 were it not for its vagueness. The risks to life created by impaired drivers justify strenuous legislative effort to reduce them, including laws authorizing the imposition of restrictions on the right to drive which involve abridgement of the principles of fundamental justice. Such

> laws must give police officers the power to act in urgent circumstances without regard to all of the requirements of natural justice. But the extent of arbitrary powers must bear a reasonable relation to the evil sought to be suppressed. Section 214(2) goes too far, because it applies to situations where there is no danger of unsafe driving due to impairment. The section does not require any connection between the consumption of alcohol and driving performance before the 24-hour suspension may be imposed.

The Ontario Highway Traffic Act authorizes the police to suspend a motorist's licence only if he or she refuses to take a breath test, which is a criminal offence, or if he or she has a BAL in excess of .05%. Consequently, even if the Ontario law violates section 7, it would most likely be justifiable under section 1.

Section 8 and the Taking of Breath and Blood Samples

Although section 8 has been used frequently to challenge the compulsory breath testing legislation, the courts have generally been unsympathetic. The Criminal Code provides that there must be some reasonable suspicion or grounds to make the request, and this apparently satisfies the Charter requirements for reasonableness.

There have been a number of cases dealing with the police seizure of blood samples taken from accused drivers who are brought into hospital. Although a measure of uncertainty remains, a trend has emerged. If the police order a doctor to take a blood sample without the suspect's consent for the purpose of determining the suspect's BAL, the police will probably be held to have violated section 8. However, if the blood sample is taken for medical purposes with the subject's consent and the police later obtain a search warrant to seize the sample or the hospital record of its analysis, they will not be held to have violated section 8.

The recent amendments to the Criminal Code authorize the police to obtain blood samples from drinking and driving suspects in certain limited situations. These provisions will inevitably be challenged under both sections 7 and 8. Given that the police now have clear statutory authority to obtain blood samples, that strict limitations are imposed on this power, and that no sample can be taken unless a doctor is satisfied that the procedure will not endanger the suspect's life or health, these challenges will probably fail.

Section 10(b) and Police Demands for Breath and Blood Samples

Section 10(b) of the Charter guarantees everyone upon arrest or detention the right to retain and instruct counsel without delay, and the right to be informed of this. The Supreme Court of Canada recently held that a motorist who was taken into police custody to take a Breathalyzer test without being informed of his right to counsel had been denied his rights under section 10(b). The Court excluded the results of the test under section 24(2) of the Charter, and the motorist was acquitted of driving with a BAL in excess of .08%. In keeping with earlier cases, the Supreme Court held that the motorist had not been arrested, but rather detained. However, the Court adopted a broad view of the term "detention."

Under the Bill of Rights, the Supreme Court had defined "detention" narrowly as some form of compulsory physical restraint. Drivers taken into custody for a Breathalyzer test were considered detained, whereas those asked to take a roadside ALERT test were not. In its recent decision, the Supreme Court redefined detention as encompassing any police demand or direction that a person would not feel free to ignore and that involves some form of compulsion or coercion. Since a refusal to comply with a demand for a Breathalyzer, ALERT, or blood test constitutes a criminal offence, those asked to submit to any of these procedures would presumably be viewed as detained and as having a right to counsel.

This case may have a significant impact on the constitutional rights of drivers stopped for random licence and insurance checks, of persons stopped while their names are being checked on police computers, and of occupants of premises that are being searched under NCA, FDA, and Criminal Code search warrants. However, it may be some time before the courts address these issues.

The uncertainties do not end once it is established that a person has a right to legal counsel under section 10(b). The courts have been struggling for some time to define exactly what this right entails. There is general agreement that the police must clearly inform an accused of his or her right to counsel, but the police are not obliged to assist an accused in finding counsel. The accused is entitled to consult with his or her lawyer in private. However, the courts have not permitted an accused to assert his or her right to counsel merely to delay the administration of justice. This is particularly important in

drinking and driving cases, because the Breathalyzer and blood tests can only be lawfully demanded and taken within a limited time frame.

Conclusion

Unlike the Bill of Rights, the Charter gives the courts a means of protecting individual rights and freedoms. However, those who expect the Charter to suddenly transform Canadian drug and alcohol laws will be disappointed. The legal rights and freedoms guaranteed in Sections 7 to 14 of the Charter are subject to both the excusing provisions of Section 1 and the government "overrides" in Section 33. Many of the Charter's key terms have been interpreted previously by the Supreme Court of Canada in a manner that favors law enforcement at the expense of individual rights. Moreover, in few areas has this judicial attitude been more evident than in drug and alcohol cases.

Nevertheless, at least some of the powers and tactics used in the enforcement of the drug laws will be limited or struck down by the Charter. Similarly, some of the broad powers of arrest, search, and seizure under the provincial highway traffic and liquor licence acts will be questioned. Perhaps what is more important than the outcome of these challenges is the fact that the Charter provides a public forum in which the nature of these powers and practices is openly discussed. Regardless of its outcome, a challenge focuses attention on whether an individual's rights have been violated. The changes made by police and prosecutors in order to avoid constitutional challenges may have a greater effect on safeguarding individual rights than the successful cases themselves. Similarly, the Charter may induce Parliament and the provincial legislatures to amend some existing laws and to consider questions of individual rights in drafting new legislation.

APPENDIX: A NOTE ON CANADIAN TOBACCO LAWS

At the turn of this century, there was a campaign to prohibit tobacco use. Tobacco, like opium, was viewed as a moral evil that undermined the values of a good Christian upbringing and led to the "moral, physical, and intellectual corruption of Canada's youth." The campaign against opium was extremely successful, resulting in strict criminal prohibitions against opiates and some other drugs that were used for non-medical purposes. In very large measure, this campaign succeeded because it was directed against only Chinese opium smokers and Chinese business interests. In contrast, the campaign against tobacco was unsuccessful. Only very narrow criminal prohibitions were enacted, while other aspects of the trade were permitted to flourish and were even supported by government. The failure of the campaign against tobacco reflected the extent to which tobacco use had become established in Canada.

Both the federal and provincial governments have constitutional control over the taxation and sale of tobacco; and both levels of government have enacted laws in these areas. The federal government controls the manufacture of tobacco through licensing provisions contained in the Excise Tax Act. In addition, this Act contains detailed rules governing the stamping, packaging, and sale of tobacco products. In Ontario, the provincial government controls the retail tobacco industry through the Tobacco Tax Act. This Act requires all tobacco vendors to have a provincial permit and imposes heavy taxes on every cigarette, cigar, or other tobacco product sold in the province. By virtue of the Minors' Protection Act, the province has also prohibited the selling, giving, or furnishing of cigarettes, cigars, or tobacco in any form to any person under 18 years of age. This provision does not apply to a child who is purchasing tobacco for his or her parent under a written request from that parent. Anyone who contravenes the act is guilty of a summary conviction offence which carries a fine of not less than $2.00 and not more than $50.00.

The federal government enacted the first criminal prohibition against tobacco in 1908. The Tobacco Restraint Act made it a criminal offence to give or sell cigarettes, tobacco, or cigarette papers to any person under 16. This summary conviction offence carries a maximum fine of $10.00 for a first offence. Anyone under 16 found in public who was smoking, chewing, possessing, or purchasing tobacco was also guilty of a criminal offence subject to reprimand for a first offence and a maximum of a $1.00 fine for a second offence. These penalties have remained unchanged since 1908, and this legislation must be among the most infrequently enforced federal penal statutes.

Despite the known health risks of tobacco use, neither the federal nor the provincial government has attempted to prohibit it. The tobacco industry is an extremely large and prosperous one in Canada. Moreover, both levels of government obtain substantial revenues from the taxes they impose on the trade. As a result, the economic interests of the tobacco industry and the government's tax revenues, as well as the health risks of tobacco use, are taken into account before legislation is enacted in this field.